

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 695

ZIFFRIN, INCORPORATED, APPELLANT,

vs.

**JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY**

FILED FEBRUARY 29, 1939.

ERRATA

page 21, line 4, add the figure "1" following the word "July" so that the line will read:

"to July 1, 1938; defendants have threatened to enforce, and"

page 24, line 20, add a comma following the word "civil" so that the line will read:

"to be brought, either directly or indirectly, any civil, criminal"

page 35, line 6 of the paragraph numbered "1.", change the word "or" to "are" so that the line will read:

"for nor are the facts stated sufficient to entitle plaintiff to any"

page 38, line 22, the last word should be completed by adding the letter "m" and the conclusion of the sentence indicated by a period so that the line will read:

"eral of the Commonwealth of Kentucky, or any of them."

page 61, line 2, change the word "distinction" to "destination" so that the line will read:

"possibility to determine the quantity or destination, whether"

page 61, line 8, change the word "here" to "her" so that the line will read:

"greater means by which Kentucky could mistreat her citi-":

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 695

ZIFFRIN, INCORPORATED, APPELLANT,

vs.

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY,
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY

INDEX.

	Original	Print
Record from D. C. U. S., Eastern District of Kentucky.....	1	1
Bill of complaint.....	1	1
Amended bill of complaint.....	31	25
Subpoena in equity and marshal's return.....	33	26
Notices of motion for temporary restraining order and marshals' returns.....	34	28
Motion for temporary restraining order.....	37	30
Restraining order.....	38	30
Order convening statutory three-judge court.....	42	33
Order designating Judge Robert R. Nevin.....	42	33
Marshal's return on certified copy of restraining order..	43	34
Motion for preliminary injunction.....	44	35
Motion to dismiss complaint and to dissolve order.....	44	35
Order extending restraining order.....	45	36
Second amended bill of complaint.....	49	38
Order filing second amended bill of complaint.....	59	46

Record from D. C. U. S., Eastern District of Kentucky—Continued.

	Original	Print
Receipt of defendants for copies of second amended bill of complaint	59	46
Defendants' consent to filing of second amended bill....	59	46
Entry of appearance of defendant William E. Baxter....	60	47
Order filing receipt of second amended petition, etc.....	61	47
Joint motion to extend motion to dismiss	61	48
Order filing joint motion	61	48
Opinion, Swinford, J.	62	48
Third amended complaint	80	62
Defendant's acknowledgment of receipt of copies of third amended bill of complaint.....	82	63
Joint motion to extend motion to dismiss.....	83	64
Waiver of notice	83	64
Judgment	85	65
Petition for appeals to the Supreme Court of the United States	92	71
Assignment of errors	95	73
Appeal bond..... (omitted in printing) ..	141	
Order allowing appeals..... (omitted in printing) ..	143	77
Citation on appeal..... (omitted in printing) ..	145	
Defendant's acknowledgment of service of citation (omitted in printing).....	149	
Order filing defendants' acknowledgment of service....	151	79
Praeipe for transcript of record (omitted in printing) ..	152	
Clerk's certificate..... (omitted in printing) ..	164	
Statement of points to be relied upon and designation of parts of record to be printed.....	165	79

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY**

In Equity. No. 1210

ZIFFRIN, INCORPORATED, Plaintiff,

v.

JAMES W. MARTIN, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, Defendants

BILL OF COMPLAINT—Filed July 18, 1938

The plaintiff, Ziffrin, Incorporated, for bill of complaint and statement of cause of action herein against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, [fol. 2] Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, states as follows:

At all of the times hereinafter mentioned the plaintiff, Ziffrin, Incorporated, was, ever since has been, and now is, a corporation created, organized and existing under and

by virtue of the laws of the State of Indiana, and was, and is, empowered by said laws to contract and be contracted with, to engage in the hereinafter mentioned business of a contract carrier by motor vehicle for hire, and to sue and be sued, by and under its corporate name, Ziffrin, Incorporated. At all of said times plaintiff had and maintained, and now has and maintains, its principal office and place of business in the City of Indianapolis, in the County of Marion, in the State of Indiana, and at all of said times plaintiff was, and is, a citizen and resident of said City of Indianapolis in said State of Indiana.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, James W. Martin, was, ever since has been, and now is, the duly appointed, qualified and acting Commissioner of Revenue of the Commonwealth of Kentucky, and a duly appointed, qualified and acting member of the Kentucky Tax Commission, and a duly appointed, constituted, qualified and acting member of the Kentucky State Alcoholic Beverage Control Board and was, and is, a citizen and resident of the City of Lexington, in Fayette County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, Emory G. Dent, was, ever since has been, and now is, a duly appointed, qualified and acting [fol. 3] member of said Kentucky Tax Commission and a duly appointed, qualified, constituted and acting member of said Kentucky State Alcoholic Beverage Control Board, and was, and is, a citizen and resident of the City of Bowling Green, in Warren County, in the State of Kentucky.

At all of the times hereinafter mentioned on and subsequent to March 6, 1938, the defendant, C. M. C. Porter, was, and is, a duly appointed, qualified and acting member of said Kentucky Tax Commission and a duly appointed, qualified, constituted and acting member of said Kentucky State Alcoholic Beverage Control Board, and was, and is, a citizen and resident of Shepherdsville, in Bullitt County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, William E. Baxter, was, ever since has been, and now is, the duly appointed, qualified and acting Distilled Spirits Administrator of said Kentucky State Alcoholic Beverage Control Board, and was,

and is, a citizen and resident of the City of Lexington, in Fayette County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 6, 1938, defendant, Hubert Meredith was, ever since has been, and now is, the duly elected, qualified and acting Attorney General of the Commonwealth of Kentucky, and was, and is, a citizen and resident of Greenville, in Muhlenberg County, in the State of Kentucky.

At all of the times hereinafter mentioned subsequent to March 7, 1938, the defendant, Harry D. France, was, ever [fol. 4] since has been, and now is, a duly appointed, qualified and acting Assistant Attorney General of the Commonwealth of Kentucky, and was, and is, a citizen and resident of the City of Louisville, in Jefferson County, in the State of Kentucky. Said Harry D. France was appointed Assistant Attorney General as aforesaid by said Hubert Meredith, Attorney General as aforementioned, with and subject to the approval of said Commissioner of Revenue, and with the sole duty to act as legal counsel for the Distilled Spirits Unit and the Malt Beverage Unit of said Kentucky State Alcoholic Beverage Control Board, created, constituted and established by the terms and provisions of the pretended and invalid enactment of a 1938 Session of the General Assembly of Kentucky hereinafter identified, and sometimes known as and called "Alcoholic Beverage Control Law".

This suit and cause is one of a civil nature in equity. The matter in controversy in this cause exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3,000.00) and arises under the Constitution and laws of the United States, and is between citizens of different States.

Continuously at all times subsequent to March 20, 1933, plaintiff, for gain and profit, has been engaged in the business of carrying and transporting goods, wares and merchandise in interstate commerce by motor vehicles and trucks for compensation and hire under and pursuant to individual contracts and agreements made and entered into between the plaintiff and the sellers and consignors and between plaintiff and the purchasers and consignees, of such goods, wares and merchandise. At no time herein mentioned or referred to has the plaintiff in any mode or manner whatsoever undertaken to transport passengers or

property whatever for the general public in interstate or — [fol. 5] foreign commerce by motor vehicle or otherwise for compensation or otherwise over regular or irregular routes, or any route whatever.

Continuously at all of the times herein mentioned the plaintiff's said carrier and trucking business was, and is, one of an established character, and said business was, and is, one of large, substantial and established cash and market value in excess of \$20,000.00 and said business yielded, and yields, to the plaintiff large and substantial pecuniary gain and profit.

At all of the times herein mentioned subsequent to March 6, 1938, said Hubert Meredith, Attorney General as aforesaid, by virtue of his said office has been, and is, the chief law enforcement officer of the Commonwealth of Kentucky and of all of the departments of said Commonwealth, and has been, and is, charged by the laws of said Commonwealth with the duty of enforcing the criminal and penal laws of the Commonwealth of Kentucky, and in prosecuting persons offending said laws, and more particularly has been, and is, charged with the duty of enforcing the penal and criminal provisions of said pretended Alcoholic Beverage Control Law and with the duty of prosecuting persons violating said pretended Act.

At all times subsequent to March 7, 1938, and by the provisions of Section 13 of said Alcoholic Beverage Control Law, defendant, Harry D. France, Assistant Attorney General as aforementioned, has been, and is, charged with the duty of enforcing the penal and criminal provisions of said pretended Act as hereinafter set forth.

At all times subsequent to March 7, 1938, and under the provisions of Section 9 of said pretended Act, the defendant, William E. Baxter, Acting Distilled Spirits Administrator as aforementioned, has been, and is, charged with [fol. 6] the duties of enforcement of said pretended Act and the terms and penal and criminal provisions thereof as hereinafter more particularly set forth.

On or about October 7, 1936, and April 9, 1937, and on or about November 16, 1936, plaintiff made and entered into two written contracts with Schenley Products Company, Inc., a corporation engaged in the business of manufacturing and selling whiskies and distilled alcoholic liquors and spirits, and its affiliates engaged in like businesses, and into a third written contract with Joseph E. Seagram &

Sons, Inc., a corporation, and its affiliates, engaged in distilling businesses as aforesaid, respectively, whereby and wherein for certain agreed hire and compensation to be paid plaintiff in said contracts mentioned and provided, the parties to said contracts respectively agreed that plaintiff should carry and transport by motor vehicles shipments and consignments of whiskies, alcoholic liquors and distilled spirits to be delivered by said contracting parties to plaintiff in Louisville, Jefferson County, Kentucky, consigned by said contracting parties for delivery to the consignees and purchasers of said whiskies, liquors and distilled spirits, in States other than the State of Kentucky, and particularly consigned for delivery to consignees and purchasers residing and located in States other than Kentucky, and consigned for delivery to such consignees and purchasers at the places of their respective residences, and particularly consigned for delivery to such consignees and purchasers residing and having their places of business in the City of Chicago, Cook County, State of Illinois.

Ever since the aforementioned dates of their respective execution, said contracts have been, and now are, in full force and effect, and pursuant to and in conformity with the terms and provisions of said contracts, and each of them, the plaintiff for compensation and hire has transported and carried from said City of Louisville, to said City of Chicago large and numerous quantities and loads of whiskies, alcoholic liquors and distilled spirits by motor vehicle sold and consigned by said Schenley Products Co. and said Joseph E. Seagram & Sons, Inc., and their aforesaid affiliates, to their respective purchasers, customers and consignees residing and doing business in said City of Chicago for delivery to said purchasers, customers and consignees in said City of Chicago. The aforementioned shipments and consignments were delivered by said Schenley Products Company, Inc., and said Joseph Seagram & Sons, Inc., and said affiliates, to plaintiff at said City of Louisville, consigned for direct and continuous carriage and transportation to said City of Chicago, and said shippers and consignors directed the plaintiff to carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation to the aforementioned purchasers and consignees in said City of Chicago, and plaintiff, in conduct-

ing its aforesaid business and in performing its aforementioned contracts did carry and transport said consignments and shipments by continuous and uninterrupted transport and carriage by motor vehicles and motor trucks from said City of Louisville to said consignees and purchasers in said City of Chicago. The direct, convenient and usual motor vehicle route from said City of Louisville to said City of Chicago is over a certain route, a portion of which lies between said City of Louisville and said City of Indianapolis, in the State of Indiana, known as U. S. Highway No. 31. The plaintiff's aforementioned transport and carriage operations conducted pursuant to the aforementioned contracts have been, and are, conducted between said City of Louisville and said City of Indianapolis en [fol. 8] route to said City of Chicago along and over said U. S. Highway No. 31, which Highway at all of the times herein mentioned continuously has been, and now is, a Federal Aid Highway, established and maintained under the laws of the Congress of the United States with the aid and assistance of funds and monies supplied and furnished by the Government of the United States.

At all of the times herein mentioned the business and operations conducted by plaintiff in the State of Kentucky have consisted solely and exclusively in the carriage and transportation by motor vehicle, pursuant to special contracts, of goods, wares and merchandise delivered to the plaintiff for carriage and transport, and by the plaintiff carried and transported, from the said City of Louisville to points and places in States other than Kentucky for delivery to persons residents of such other points and places, and in the further business of accepting delivery of such goods, wares and merchandise at points situated in places and States other than Kentucky for carriage and delivery by motor vehicle pursuant to special contracts, to persons residing and situated and doing business in said City of Louisville, and in delivering the same consistently with said undertakings of transport and carriage. At no time herein mentioned has the plaintiff carried any goods, wares or merchandise whatsoever or passengers whomsoever from any point in Kentucky for delivery to any other point or place situated in the State of Kentucky.

In the conduct of its aforementioned business of motor transportation and carriage of whiskies, liquors and dis-

titled spirits between said City of Louisville and said City of Chicago in the period subsequent to October 7, 1936, the plaintiff has realized net operating gains and profits in an amount exceeding \$20,000.00, and if allowed to continue to perform and carry out the contracts aforesaid [fol. 9] the plaintiff hereafter will realize net gains and operating profits in large and substantial amounts.

On or about the 30th day of September, 1935, and pursuant to the powers and authority conferred upon it by the Act of Congress in such cases made and provided, the Interstate Commerce Commission by its proper order extended until and including the 12th day of February, 1936, the period and time within which any contract carrier as defined in the Motor Carrier Act, 1935, or its predecessor in interest, which was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application should be made, might make application to said Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing such contract carrier to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States. On July 1, 1935, and prior thereto; plaintiff was in bona fide operation as a contract carrier by motor vehicle as aforesaid over the route aforesaid from and between said City of Louisville and said City of Chicago, and elsewhere. Prior to the 12th day of February, 1936, and within the period of time extended as aforementioned, plaintiff duly and properly made, lodged and filed proper application in writing to and with said Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing plaintiff to engage in the business of a contract carrier by motor vehicle in interstate commerce on any public highway within the territory and along the route specified in said application, which territory and routes, among others, included the aforesaid route between said City of Chicago and said City of Louisville [fol. 10] along and over the aforesaid U. S. Highway No. 31.

Said Motor Carrier Act, 1935, among other things and with respect to such application and the pendency and de-

termination thereof, provided and provides as follows, to-wit:

"Pending determination of any such application the continuance of such operation shall be lawful."

At all times subsequent to the aforementioned filing thereof, the aforesaid application lodged and filed by plaintiff as aforementioned with said Interstate Commerce Commission has been, and now is, pending before and undetermined by, said Interstate Commerce Commission.

In the conduct of so much of its aforementioned interstate business as penetrates the interior of the State of Kentucky, plaintiff, to avoid controversy, always earnestly has sought to submit to and to comply with any and all statutory enactments of the General Assembly of the Commonwealth of Kentucky, and even to submit to and comply with certain pretended enactments of said General Assembly which in application to the plaintiff's said interstate business transcended the powers, authority and competency of said General Assembly and were in contravention of and repugnant to the Constitution of the United States and therefore null and void.

In 1934 plaintiff made application to the Division of Alcoholic Control of the Department of Business Regulation of the Commonwealth of Kentucky that plaintiff be granted a special liquor transportation permit as provided in subsection "b" of Section 5, of Chapter 149 of the 1934 Acts of the General Assembly of Kentucky, [fol. 11] which Act was approved by the Governor of the Commonwealth of Kentucky on March 17, 1934, to engage in the transportation of distilled spirits within the State of Kentucky, and also to engage in the transportation of distilled spirits for import and export purposes, and paid to the Commonwealth of Kentucky the required fee incident to such application and the issuance of such permit, and in the year 1934 the aforesaid Division of Alcoholic Control granted said application and issued to the plaintiff a Special Liquor Transportation Permit and said permit so issued thereafter was renewed and continued in effect from year to year by said Division of Alcoholic Control in, to and for the years 1935, 1936, 1937, and to and including June 30, 1938, and for the first six months of the calendar year 1938, said privilege was evi-

denced by Special Liquor Transportation Permit No. 191, issued as aforesaid and held by plaintiff.

On or about May 20, 1937, and by appropriate instrument in writing executed for and in its behalf by its proper officers thereunto duly authorized and empowered, plaintiff executed, filed and lodged with the Secretary of State of the Commonwealth of Kentucky a certain instrument in writing designating Hennessy Basch, of Louisville, Kentucky, the agent of the plaintiff upon whom process might and may be served in any action instituted and brought against the plaintiff in the Commonwealth of Kentucky, and paid to the said Secretary of State the filing fee incidental to and exacted and required upon the filing of such designation.

Shortly prior to July 27, 1936, plaintiff made appropriate application to the Department of Motor Transportation of the Kentucky State Tax Commission of the Commonwealth of Kentucky for a permit to transport whiskey and distilleries' supplies, and on July 27, 1936, said Department of Motor Transportation issued to the plaintiff Permit No. 445, dated July 27, 1936, stating and specifying that plaintiff having complied with the laws and with [fol. 12] the regulations of said Commission, a permit was thereby granted to the plaintiff to transport whiskey and distilleries' supplies.

None of the permits, certificates and licenses hereinbefore mentioned ever has been revoked or cancelled.

At all times subsequent to its incorporation and organization as aforementioned, plaintiff continuously has been engaged as a contract carrier by motor vehicle as aforementioned along and over the aforesaid route between said City of Louisville and said City of Chicago, and ever since the execution of the aforementioned contracts with the aforesaid distillers the aforementioned carriage and transportation of whiskies, alcoholic liquors and distilled spirits pursuant to said contract has constituted the major and principal portion of the business conducted by plaintiff as a contract motor carrier between said City of Louisville and said City of Chicago along and over the route hereinbefore specified.

None of Plaintiff's aforementioned operations penetrating into the interior of the State of Kentucky has been conducted elsewhere in said State than within the limits of a city or incorporated town, or between such city or

town and points within ten miles of the limits thereof in instances where the same is a city of the first, second, third or fourth or fifth class, or elsewhere than within five miles of the limits of such incorporated town in instances where such incorporated town is one of the sixth class, all as defined and prescribed by the Kentucky Statutes in such cases made and provided (Carroll's Ky. Stats. Sec. 2739j-94).

For a period exceeding one year next preceding July 1, 1938, plaintiff owned, used and employed, and now owns, not less than 7 motor trucks and units of automotive equipment and operated not less than 25 motor trucks, and employed not less than an average of 40 men in the conduct [fol. 13] of its aforementioned business of transporting whiskies, alcoholic liquors and distilled spirits between the said City of Chicago and said City of Louisville and over and along the aforesaid Federal Aid Highway. For more than a year preceding July 1, 1938, plaintiff's capital investment in said trucks and equipment was, and now is, a sum and amount exceeding \$10,000.00.

Each and all of the aforementioned acts and operations of carriage and transportation conducted by plaintiff as aforesaid have been necessarily incidental to the sales and purchases of alcoholic whiskies, liquors and distilled spirits, sold for delivery to purchasers residing and situated in a State other than that of the State in which the producer, manufacturer and seller resided and was situated, and under contracts of sale and delivery requiring the delivery of such merchandise to the purchasers thereof at such purchasers' aforementioned places of residence and business, and each and all of plaintiff's aforementioned operations of carriage and transportation constituted, were, and are, commerce among the several States.

The 1938 General Assembly of the Commonwealth of Kentucky assumed and pretended to enact a certain pretended statute known as and called "Alcoholic Beverage Control Law", being Chapter 2 of Acts of 1938 Special Session of the General Assembly of Kentucky, Carroll's Ky. Stats., Sec. 2554b-97, et. seq., entitled:

"An Act providing for the regulation of the manufacture of and traffic in alcoholic beverages; requiring licenses therefor and fixing the amounts of license fees; creating Kentucky State Alcoholic Beverage Control Board, with

appropriate powers for the enforcement of this Act; fixing the compensation of members of said Board and employees to be appointed by it; authorizing the issuance, revocation, and suspension of licenses; imposing prohibitions, restrictions and regulations and fixing penalties for violations of this Act; empowering counties, and cities of the first, second [fol. 14] and third classes, to have alcoholic beverage administrators with appropriate powers to adopt and enforce restrictions and regulations of the alcoholic beverage traffic in such city or county, in conformity with this Act; to issue local licenses and fix the fees therefor, to revoke same, and to impose local regulations and penalties, not inconsistent with this Act; transferring the functions and resources of the Division of Alcoholic Control in the Department of Business Regulation to the Department of Revenue; repealing certain sections of Carroll's Kentucky Statutes, 1936 edition, and all inconsistent laws; and declaring an emergency to exist."

On March 7, 1938, said pretended Act was signed and approved by Honorable Albert B. Chandler, the duly elected, qualified and acting Governor of the Commonwealth of Kentucky.

Among other things said Alcoholic Beverage Control Law, pretends and assumes to provide as follows:

"§ 3. Functions.—The administration of this Act and the regulation of the traffic in alcoholic beverages in this Commonwealth is hereby vested in the Department of Revenue."

"§ 4. Organization.—(a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§ 5. Administrators: Salaries.—The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test pro-

vided for in Section 4618-90. (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§ 6. Powers and Duties of Administrators.—The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in malt beverages."

"§ 7. Alcoholic Beverage Control Board; Creation; Functions; Limitations.—The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties:

(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to applications for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created."

"§ 9. Powers of Members, Officers and Employees.—The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Admin-

Administrators and Field Representatives shall be coextensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

§ 13. Legal Counsel for Board.—The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."

[fol. 16] "§ 18. Expiration Date of Licenses; License Taxes.—All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: * * *

(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum."

"§ 27. Business Authorized Under a Transporter's License.—A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

"§ 33. Applications for Licenses; Issuance of Same.—Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money

order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State Board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in sub-sections 6 and 8 of section 29 of this Act shall be issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue."

"§ 52. No traffic in Alcoholic Beverages Save Under License.—It shall be a criminal offense for any person to manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport, or otherwise traffic in alcoholic beverages without first [fol. 17] having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued together with a penalty equal to twenty (20) per cent of said license tax."

"§ 53. Declaring Certain Property Contraband: Providing for Its Disposition.—The following property is hereby declared to be contraband;

.

(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

.

(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.

Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in sub-section six above, whose lien is of record to intervene and establish his rights in such property by providing that the property was being used in connection with traffic in alcoholic beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being bona fide shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

[fol. 18] "§ 54 (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§ 89. Transportation by Non-Licensee Prohibited; Exception.—No person except a railroad company or railway express company shall transport or cause to be transported

any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

"§ 94. Penalties for Trafficking in Alcoholic Beverages Without a License.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction, shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than \$500.00 and not to exceed \$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§ 95. Penalties for Violations of Other Sections of this Act.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months, or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the [fol. 19] revocation of the offender's license; provided, that in case the offender be a corporation joint stock company, association or fiduciary, then the principal officer or officers

responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."

"§ 119. Transfer of Functions and Resources of Division of Alcoholic Control from the Department of Business Regulation to the Department of Revenue.—The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending business of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§ 123. Declaring an Emergency.—The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."

[fol. 20]³ From and after the aforesaid approval of said pretended Alcoholic Beverage Control Law and consistently and conformably with the terms and provisions thereof as written, it became incumbent and mandatory upon plaintiff from and after July 1, 1938, to be the holder of the certain license to transport distilled spirits mentioned in Section 18 of said pretended Act if the plaintiff were to continue to conduct its aforementioned business under and pursuant to its aforesaid contracts with the aforementioned distillers and with other persons similarly situated and if plaintiff and plaintiff's officers were not to be exposed to the infliction of the penalties assumed to be provided and specified by the aforesaid pretended Act, and if the whiskies, liquors and distilled spirits in course of transportation and carriage in interstate commerce as aforementioned, and the motor vehicles bearing the same, were not to be exposed to seizure as contraband and to confiscation as provided in and by said pretended Act.

On or about June 4, 1938, in order to avoid controversy with law enforcement officers of the Commonwealth of Kentucky and on a printed form prepared and furnished by the Division of Motor Transportation of the Commonwealth of Kentucky, plaintiff made written and sworn application in proper form to said Division of Motor Transportation that plaintiff be granted a Common Carrier's Truck Certificate to operate a motor freight line from Louisville, Jefferson County, Kentucky, to the Indiana State line in interstate carriage only and along and over aforesaid U. S. Highway No. 31. With said application plaintiff tendered and delivered and paid to said Division of Motor Transportation the required payment of \$25.00. On June 23, 1938, in the new Capitol Building at Frankfort, Kentucky, and pursuant to proper notice theretofore given by him to all interested parties, the Honorable D. C. Moore, Director of said Division of Motor Transportation, held a hearing upon said [fol. 21] application. Upon said hearing plaintiff expressly stated and disclosed that its business and operations were not those of a common carrier by motor truck but that its business and operations were those of a contract motor carrier, and that plaintiff sought and applied for said common carrier's truck certificate merely to render it eligible to receive the aforementioned Liquor Transporter's License provided for in the aforesaid pretended Alcoholic Beverage Control Law. Pursuant to said hearing of said application

for a Common Carrier's Truck Certificate, said D. C. Moore, Director as aforesaid, determined and decided that plaintiff was not eligible to receive a Common Carrier's Truck Certificate, and on or about June 30, 1938, said D. C. Moore, Director as aforesaid, entered and filed an order and decision denying and dismissing plaintiff's said application for said Common Carrier's Truck Certificate, and thereby rendered plaintiff ineligible to obtain or receive the Liquor Transporter's License aforementioned.

In order to avoid controversy with law enforcement officials of the Commonwealth of Kentucky as aforementioned, and on a printed form supplied by the Department of Revenue of the Commonwealth of Kentucky and on May 25, 1938, plaintiff made and executed signed and sworn application, in writing and in proper form, to the Department of Revenue of the Commonwealth of Kentucky to be granted the certain license to transport distilled spirits and wine mentioned and prescribed in the aforesaid pretended Alcoholic Beverage Control Law. On June 7, 1938, plaintiff lodged and filed said application with said Department of Revenue and simultaneously therewith paid to said Department of Revenue the required fee for said license in the amount of \$10.00, likewise filed and lodged with said Department of Revenue the required bond duly executed dated May 31, 1938, whereby and wherein plaintiff as principal, and Standard Accident Insurance Company, of Detroit, Michigan, [fol. 22] as surety, bound themselves in the sum of One Thousand Dollars (\$1,000.00) that the plaintiff would not suffer or permit any violation of the provisions of said Alcoholic Beverage Control Law as it may be amended or of regulations issued pursuant thereto, and that in the event of any such violation that all fines and penalties which shall accrue during the time that the said license so applied for should be in effect shall be paid, together with all costs taxed or allowed in any proceeding brought or instituted for violating any of the provisions of said Alcoholic Beverage Control Law, and simultaneously therewith plaintiff tendered and filed with said Department of Revenue the required affidavit of F. J. Wolke, Manager of the Dispatch Room of the Courier Journal, a daily newspaper of general circulation in Louisville, Jefferson County, Kentucky, which affidavit states that on June 2, 1938, and June 6, 1938, there was published in said newspaper's issues of said dates the notice required by said Alcoholic Beverage Control Law that

plaintiff intended to apply for the aforesaid license to transport distilled spirits. On June 2, 1938, and June 6th, 1938, plaintiff advertised its intention to apply for the last mentioned license by inserting in the aforementioned newspaper, which, prior thereto long had been, then was, ever since has been, and now is, a newspaper of general circulation in said Jefferson County, in the State of Kentucky, notice of plaintiff's intention to apply for said last mentioned license as aforementioned by inserting in said mentioned issues of said newspaper a concise advertisement stating the name and address of the plaintiff, and the names and addresses of the principal officers and directors of the plaintiff, and that application would be made for the type of license aforesaid. To the last mentioned application and affidavit there was attached at the time of the aforesaid delivery and filing thereof a newspaper clipping of the aforesaid advertisement published as aforesaid.

[fol. 23] On or about July 8, 1938, said Department of Revenue, said William E. Baxter, Acting Distilled Spirits Administrator as aforesaid, and said James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, said Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, and said C. M. C. Porter, Member of Kentucky State Alcoholic Beverage Control Board, denied and refused to grant to plaintiff said last mentioned Liquor Transporter's license; and on July 14, 1938, said James W. Martin, Commissioner of Revenue as aforesaid, by writing dated July 8, 1938, notified plaintiff of said denial and refusal, and said notice was the first notice received by plaintiff of said denial and refusal.

By reason of said last mentioned denial and refusal, and conformably with the ostensible and pretended provisions of said pretended Alcoholic Beverage Control Law, plaintiff apparently is ineligible and disqualified to transact and conduct its aforesaid interstate contract carrier business as a carrier of whiskies, alcoholic liquors and distilled spirits, and if plaintiff undertakes the carriage and transportation of such commodities as aforementioned, it will render itself, its officers, its employees engaged in such transportation, the shipments of such commodities carried by it, and the motor vehicles transporting such commodities,

liable to the infliction of the penalties assumed to be provided by said pretended law.

[fol. 24] On several days and occasions on and subsequent to July, 1938, defendants have threatened to enforce, and unless enjoined and restrained by this Court will attempt to enforce, the aforementioned penal, criminal and confiscatory provisions of the aforesaid pretended Alcoholic Beverage Control Law against the plaintiff, against plaintiff's officers, against shipments of whiskies, liquors and distilled spirits being transported in interstate commerce by plaintiff as aforesaid and against the motor vehicles owned and operated by plaintiff carrying said shipments, and on several days and occasions on and subsequent to July 1, 1938, defendants have threatened, and now threaten, to seize as contraband and to confiscate shipments of liquors and distilled spirits transported and carried by plaintiff in interstate commerce as aforementioned over and along aforesaid U. S. Highway No. 31 and between said City of Louisville and said City of Chicago, and similarly to seize and confiscate the plaintiff's motor trucks transporting such cargoes, in the event that plaintiff continues to carry and transport such consignments of whiskies, liquors and spirits in transit in interstate commerce as aforesaid pursuant to performance of plaintiff's aforesaid contracts with the aforesaid distillers and like contracts with other persons similarly situated.

At all times subsequent to July 1, 1938, the aforementioned distillers and other persons with whom plaintiff has contracts like and similar to those hereinbefore identified and described, have entertained, and now entertain, fear and apprehension that if they deliver whiskies, liquors and spirits as aforesaid to the plaintiff for carriage and transportation in interstate commerce over the aforesaid route as aforementioned, the said cargoes and consignments will be seized and confiscated by defendants and the law enforcement officers of the Commonwealth of Kentucky under and pursuant to the terms, provisions and prohibitions of the aforesaid pretended Alcoholic Beverage Control Law, and in consequence of said apprehension and the fear that the said consignments and cargoes of whiskies and liquors will be seized and confiscated as aforementioned the aforementioned distillers and other similarly situated customers of plaintiff have declined and refused, and now decline and refuse, to do further business of the character mentioned

with plaintiff and have refused and declined, and now refuse and decline, to deliver and entrust to plaintiff for interstate transportation and carriage along and over the route aforesaid any consignment or shipment of liquors, whiskies or distilled spirits whatsoever. Defendants' aforementioned threats have intimidated the aforementioned distillers and plaintiff's other aforementioned customers and have caused and coerced said distillers and said customers to refrain from doing and transacting business with plaintiff as aforementioned, have substantially interfered with and done damage to plaintiff's aforesaid advantageous contractual relations with said distillers and said other customers, and if said threats are continued plaintiff's aforesaid business [fol. 26] of a contract carrier by motor vehicle of whiskies, liquors and distilled spirits in interstate commerce along and over the route hereinbefore specified will be destroyed, the value of said business and plaintiff's aforesaid investment therein will be lost and destroyed, no further profit will accrue to the plaintiff from said business and investment, to the plaintiff's damage in an amount exceeding \$75,000.00.

Inevitable, immediate, irreparable and great loss and damage heretofore have been inflicted upon plaintiff by defendants' said threats, and further losses and damages as aforesaid will be inflicted upon and suffered by the plaintiff in the event the aforesaid threats of enforcement of said pretended Alcoholic Beverage Control Law are continued by defendants, said loss and damage are not susceptible of definite measurement, ascertainment or statement in pecuniary terms.

In application to the plaintiff in the conduct of its aforesaid interstate contract motor carrier business along and over the interstate route hereinbefore specified said Alcoholic Beverage Control Law and its aforementioned pretended terms and provisions are, and each of them is, unconstitutional, null and void, in that the same contravene and are repugnant to, and each of them contravenes and is repugnant to, the Commerce Clause and the Due Process Clause of the Constitution of the United States as amended, and in that said pretended Act and the several aforementioned provisions thereof assume and undertake to deprive this plaintiff of its aforementioned property without due process of law and in that the same assume and undertake

to regulate, to burden, to obstruct and to prohibit commerce among the several States as aforesaid.

[fol. 27] The plaintiff cannot maintain an action for the recovery of said damages against the sovereign State of Kentucky. The plaintiff is without adequate or any remedy at law in the premises.

The defendants, Hubert Meredith, Attorney General as aforesaid, and Harry D. France, Assistant Attorney General as aforesaid, and William E. Baxter, Acting Distilled Spirits Administrator, as aforesaid, are, and each of them is, charged by law with the duty to prosecute all violations of said pretended Alcoholic Beverage Control Law and to cause appropriate proceedings to be commenced and prosecuted in the proper Court without delay for the enforcement of the penalties provided in said pretended Alcoholic Beverage Control Law and to seize and confiscate as contraband all distilled spirits, whiskies and alcoholic liquors transported in contravention of the pretended terms and provisions of said pretended Alcoholic Beverage Control Law, and unless restrained and enjoined by this Court from so doing said defendants intend, threaten to, and will cause criminal proceedings to be commenced and prosecuted for the enforcement of the aforesaid penalty against the plaintiff and its officers and will seize and confiscate any and all distilled spirits, liquors and whiskies which the plaintiff may undertake to carry and transport as a contract motor carrier engaged in interstate commerce along and over the route hereinbefore specified, and will seize and confiscate all of plaintiff's motor vehicles engaged in so transporting the same. Unless this Court shall determine the invalidity and unconstitutionality of said pretended Act in this proceeding plaintiff will be compelled to submit to said pretended Act whether the same be valid or invalid and plaintiff thereby will be deprived of its property without due process of law and will be denied the right and privilege to engage in interstate commerce among the several states as [fol. 28] aforementioned, in contravention of the 14th Amendment to the Constitution of the United States, and in contravention of Article I, Sec. 8, Clause 3 of the said Constitution.

Great, immediate and irreparable loss, injury and damage as aforesaid will result to plaintiff before this cause can be heard on notice.

Wherefore, the plaintiff, Ziffrin, Incorporated, prays that a temporary restraining order and that preliminary and permanent and perpetual injunctions be adjudged, decreed, granted, entered and issued, enjoining and restraining the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents, from bringing, and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing the aforesaid pretended Alcoholic Beverage Control Law, or any provision thereof, against the plaintiff, its officers, representatives, agents or employees, or any of them, from seizing or confiscating, and from attempting and from threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors whatsoever carried and transported by plaintiff as a contract motor carrier for hire between the City of Louisville, Kentucky, and the City of Chicago, Illinois, or to points and places intermediate said two Cities along and over the Federal Aid Highway known as U. S. Highway No. 31, and from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said pretended Alcoholic Beverage Control Law, and from taking, and from threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport

and carriage, or any of them; prays further that the defendants, their successors, assistants, deputies, and each of them, be ordered restrained and enjoined as aforesaid by preliminary injunction issued herein during the pendency of this cause; prays further than an order to show cause issue herein upon application of the plaintiff directed to defendants requiring them to show cause why a preliminary injunction should not issue as aforesaid; prays further that a temporary restraining order issue herein pending the hearing of said order to show cause why a preliminary injunction should not be issued and granted herein; prays further that upon the hearings aforesaid the said pretended Alcoholic Beverage Control Law be adjudged, declared and held to be unconstitutional, illegal and void, and that a perpetual and permanent injunction be granted and issued restraining the enforcement of said pretended Act as herein- [fol. 30] above prayed for; prays further for its costs herein incurred and expended, and for other general and equitable relief to which it may appear to be entitled.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenebaum, Howell Ellis, Attorneys for Plaintiff.

Duly sworn to by Sam Ziffrin. Jurat omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT--Filed July 18, 1938

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court amends its Bill of Complaint this day filed herein and for such amended Bill of Complaint against each and all of the defendants named in the original Bill of Complaint herein states as follows:

In application to the plaintiff in the conduct of its interstate contract motor carrier business of carrying and transporting whiskies, alcoholic beverages and distilled spirits along and over the certain route and U. S. Highway No. 31 all mentioned, described and identified in said original Bill of Complaint, the said pretended Alcoholic Beverage Control Law identified in said original Bill of Complaint and the several pretended terms and provisions thereof mentioned and quoted in said original Bill of Complaint are, and each of them is, unconstitutional, null and void in that the

same contravene and are repugnant to, and each of them contravenes and is repugnant to, the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States in that said pretended Alcoholic Beverage Control Law and the aforesaid terms and provisions thereof assume and undertake to deny to this plaintiff the equal [fol. 32] protection of the laws in that they permit and allow common carriers of goods, wares and merchandise to do and transact business of the kind and character aforesaid and assume and undertake to deny the right and privilege of doing and transacting such business to contract carriers, this plaintiff included, and in that the aforementioned distinction and discrimination between such common carriers and such contract carriers, this plaintiff included, is not justified by any real or substantial difference whatever between carriers of the two mentioned kinds and varieties or by any reasonable relation whatever to any supposed subject or object of said pretended legislation.

Plaintiff reiterates and reaffirms each and all of the allegations contained in said original Bill of Complaint.

Wherefore, the plaintiff, Ziffrin, Incorporated, prays judgment and a decree and interlocutory relief against the aforementioned defendants, and each of them, as prayed in said original Bill of Complaint herein, for its costs herein incurred and expended, and for all other general and equitable relief to which plaintiff may appear to be entitled.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenebaum, Howell Ellis, Attorneys for Plaintiff.

[fol. 33] IN UNITED STATES DISTRICT COURT

SUBPOENA IN EQUITY—Returned and filed July 19, 1938

The President of the United States of America to James W. Martin, Commissioner of Revenue of the Commonwealth of Ky., Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; Emory G. Dent, Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Ky. Tax Commission and Member of Ky. State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Administrator of Ky. State Alcoholic Beverage Control Board; Hubert Mere-

dith, Attorney General of the Commonwealth of Kentucky; and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Eastern — of Kentucky, at Frankfort, Kentucky to answer unto the bill of complaint and an amended bill of complaint both filed this day by Ziffrin, Incorporated, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable H. Church Ford, United States District Judge at Frankfort, this 18th day of July, A. D. 1938.

A. B. Rouse, Clerk, by Sara M. Caden, Deputy Clerk.
(Seal.)

Memorandum

The Defendant in this case — required to file — answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Received this writ at Lexington, Ky. on July 18, 1938 and on the same day executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of the Ky. State Tax Commission and Member of the Ky. State Alcoholic Beverage Control Board; Emory G. Dent, & C. M. C. Porter, Members of Ky. Tax Commission and Members of Ky. State Alcoholic Beverage Control Board; William E. Baxter, Acting Distilled Spirits Administrator of Ky. Alcoholic Beverage Control Board, and Hubert Meredith, Attorney General of the Commonwealth of Kentucky, at Frankfort, Franklin County, Kentucky. Returned unexecuted as to Harry D. France; not found in this bail-wick; said to be in Louisville, Ky.

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.

Fee	10.00
Cost	1.68
	<hr/> 11.68

[fol. 34] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Returned and filed July 19, 1938

The defendant, Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, is hereby notified that at 10:00 A. M. on the 19th day of July, 1938 and in the Court rooms of the United States District Court for the Eastern District of Kentucky, located and situated in the Federal Building in the City of Lexington, Fayette County, State of Kentucky, or as soon thereafter as it may be heard, the plaintiff, Ziffirin, Incorporated, will appear by counsel before the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, and then and there and in the above entitled cause will move the said Court and Judge to grant plaintiff a temporary restraining order, restraining the defendants named in the Bill of Complaint in said cause and each of them conformably with the prayer of the said Bill of Complaint.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

MARSHAL'S RETURN

Received this writ at Louisville, Ky. on July 18, 1938 and on July 18, 1938 at Louisville, Ky., served the within named Harry D. France, Asst. Attorney General of the Commonwealth of Kentucky and left a true copy thereof with the person named above.

L. E. Cranor, U. S. Marshal, by H. W. Milligan, Deputy.

[fol. 35] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Returned and Filed July 19, 1938

The defendants, James W. Martin; Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky

State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, are, and each of them is, hereby notified that at 10 o'clock A. M. on the 19th day of July, 1938, and in the Court Rooms of the United States District Court for the Eastern District of Kentucky, situated in the City of Lexington, Fayette County, State of [fol. 36] Kentucky, or as soon thereafter as it may be heard, the plaintiff, Ziffrin, Incorporated, will appear by counsel before the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, and then and there and in the above entitled cause will move the said Court and Judge to grant plaintiff a temporary restraining order restraining the defendants, and each of them, conformably with the prayer of the Bill of Complaint in said cause.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

MARSHAL'S RETURN

Received this notice at Lexington, Ky., on July 18, 1938, and on the same day executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent and C. M. C. Porter, Members of the Kentucky Tax Commission and Kentucky State Alcoholic Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky. Returned unexecuted as to Harry D. France; not found in this bailwick; said to be in Louisville. Executed on Wm. E. Baxter, at Frankfort, Franklin County, Kentucky.

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.

[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed July 19, 1938

Comes plaintiff, Ziffin, Incorporated, by Counsel, and moves the Court,

(1) That the filing on July 18, 1938, of plaintiff's amended bill of complaint be noted of record and that said amended bill be made part of the record herein, and further moves the Court upon plaintiff's bill of Complaint as amended herein.

(2) That a temporary restraining order be granted against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, pending the hearing and decision of plaintiff's motion for a preliminary and temporary injunction, enjoining the defendants, and each of them, conformably with the prayer of the Bill of Complaint herein.

Norton L. Goldsmith, Selligman, Goldsmith, Everhart & Greenbaum, Howell Ellis, Attorneys for Plaintiff.

[fol. 38] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER—Entered and Filed July 19, 1938

This matter coming on to be heard at Lexington at 10:00 o'clock A. M., on Tuesday, July 19, 1938, plaintiff being represented by counsel and the defendants being present in court and by counsel, the court being sufficiently advised is of the opinion that there is danger of immediate and irreparable injury, loss and damage to the plaintiff incident to

delay in serving the necessary notice and the fixing of the time of the hearing for a Three Judge Court,

Now, Therefore, the Court being sufficiently advised, it is hereby ordered and decreed that the aforesaid motions be and the same are, and each of them is, hereby sustained, and

[fol. 39] (1) That the filing on July 18, 1938, of plaintiff's amended Bill of Complaint in the office of the Clerk of this Court, be and the same is hereby noted of record, and said amended Bill of Complaint is hereby made part of the record herein, and

(2) That the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, William E. Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, and the successors, assistants, deputies and agents of said defendants, and each of them, be, and they are, and each of them is, hereby temporarily restrained and enjoined—on the ground or for the reason, that there has not been issued to the plaintiff, and plaintiff does not hold or possess, a liquor transporter's license of the Kentucky State Alcoholic Beverage Control Board—from bringing, and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil, criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing the Alcoholic Beverage Control Law enacted by the General Assembly of the Commonwealth of Kentucky at a Session thereof held in the year 1938, or any provision thereof, against the plaintiff, its officers, representatives, agents or employees, or any of them, from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors, whatsoever, carried and transported by plaintiff as a motor carrier between the City of

[fol. 40] Louisville, Jefferson County, Kentucky, and the City of Chicago, Cook County, Illinois, or to points and places intermediate said two cities along and over U. S. Highway No. 31, and from seizing or confiscating, and from attempting and threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said Alcoholic Beverage Control Law, and from taking, and from threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them.

This temporary restraint is on condition that a bond be filed herein in the penal sum of \$5,000.00, executed by the plaintiff as Principal, and with good and sufficient surety thereon, approved by the Clerk of this Court, which bond shall be conditioned that the plaintiff will pay to the defendants all costs, losses and damages which may result from the issuance of said temporary restraining order if it should be finally determined that the same was improperly issued, or that may be awarded to defendants by reason of the granting of said order.

It is further and hereby ordered that the defendants appear before the District Court of the United States for the Eastern District of Kentucky, at a session thereof to be held in the Court Room of said Court in the City of Louisville, State of Kentucky, by agreement of parties, at 1:30 o'clock, P. M. on the 26th day of July, 1938, then and there to show [fol. 41] cause, if any there may be why the preliminary injunction prayed in the Bill of Complaint as amended herein should not issue, and the said defendants and the Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky, are, and each of them is, hereby notified of said hearing.

It is further ordered that the aforesaid defendants, he, and they are, and each of them is, hereby restrained as heretofore set forth until the further order of this Court.

It is further and hereby ordered that a copy of this order, certified under the hand of the Clerk and the seal of this Court, be served upon each of the defendants, and upon the

Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky; that a copy of the writ issued hereon shall be published in the Louisville Times, a newspaper published in Louisville, Jefferson County, Kentucky, and that this order shall be binding upon all persons who have knowledge of the contests and purport thereof:

To the foregoing rulings the defendants are granted exceptions.

This order signed and issued this 19th day of July, 1938, at 1:00 o'clock P. M.

(S.) Mac Swinford, Judge.

Certified. A. B. Rouse, Clerk, by J. A. Bodkin, D. C.
(Seal.)

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER CONVENING THREE-JUDGE COURT—Entered and Filed
July 19, 1938.

Preliminary injunction having been granted in this case, and it appearing to the Court from the Bill of Complaint, that it is necessary to convene a Three-Judge Court; the Court called to his assistance the Hon. Elwood Hamilton, Circuit Judge and the Hon. Robert R. Nevin, District Judge, and this case is set down for hearing at Louisville, Ky., on Tuesday, July 26, at 1:30 P. M., 1938.

Mac Swinford, Judge.

IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING JUDGE—Entered and Filed July 19, 1938.

It having been made to appear to me that the public interest so requires, I do hereby designate and appoint the Honorable Robert R. Nevin, United States District Judge for the Southern District of Ohio, to hold the United States District Court for the Eastern District of Kentucky, in any of the divisions thereof, in place of or in aid of or with the regular judge of such Eastern District. Such designation and appointment are to continue in full force and effect during the pendency, trial and conclusion of the case of

Ziffin, Incorporated, vs. James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; William E. [fol. 43] Baxter, Acting Distilled Spirits Administrator of Kentucky State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and the judge so designated is to have all the powers and be subject to all the duties contemplated by Sections 14, 18, 19 and 226 of the Judicial Code as now amended being Sections 18, 22, 23 and 380, Title 28, U. S. C. A.

Dated at Louisville, Kentucky, July 21, 1938.

Elwood Hamilton, Presiding Circuit Judge, Sixth Judicial Circuit.

IN UNITED STATES DISTRICT COURT

MARSHAL'S RETURN ON CERTIFIED COPY OF RESTRAINING ORDER
—Returned and Filed July 25, 1938.

Received this order at Lexington, Ky., on July 20, 1938 and on July 21, 1938 executed same by serving a true copy of the within writ on James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Ky. Tax Commission and Member of the Ky. State Alcoholic Beverage Control Board; Emory G. Dent and C. M. C. Porter, Members of the Ky. Tax Commission and Members of the Ky. State Alcoholic Beverage Control Board; Hubert Meredith, Attorney General of the Commonwealth of Kentucky; William E. Baxter, Acting Distilled Spirits Administrator of the Ky. State Alcoholic Control Board and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, at Frankfort, Franklin County, Kentucky. On July 22, 1938 I executed same on Albert B. Chandler, Governor of the Commonwealth of Kentucky, by serving a true copy on his private secretary, Walter Mulbry, at his

office in Frankfort, Franklin County, Kentucky, he accepting said service (3:15 P. M.).

J. M. Moore, U. S. Marshal, by R. A. Gayle, Chief Deputy.

[fol. 44] IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed July 26, 1938

Comes the plaintiff, Ziffirin, Incorporated, by counsel, and moves the Court upon its verified Bill of Complaint as amended herein, and upon the facts shown by affidavits tendered herewith, that plaintiff be granted a preliminary injunction against the defendants named in said Bill of Complaint, and each of them, enjoining and restraining said defendants, and each of them, conformably with the prayer of said bill of Complaint as amended pending the further order of the Court.

Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenbaum, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT AND TO DISSOLVE ORDER—Filed July 26, 1938.

Come the defendants by counsel and move the court to dismiss bill of complaint filed in the above entitled action, and to dissolve the temporary restraining order issued thereon on July 19, 1938, upon the grounds and for the following reasons, to-wit:

1. That the said bill of complaint is void for want of equity and does not state facts sufficient to constitute a valid cause of action in equity in favor of complainant and against the defendant; that the said bill of complaint does not state any matter of equity entitling the plaintiff to relief prayed for nor the facts stated sufficient to entitle plaintiff to any relief against these defendants.

Wherefore defendants pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

Hubert Meredith, Attorney General (Signed) Harry D. France, William Hays, Assistant Attorneys General for Defendant, James W. Martin, et al.

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING RESTRAINING ORDER—Entered and Filed
August 29, 1938

This cause came on for hearing pursuant to agreement of all parties thereto at 1:30 o'clock P. M. on Tuesday, July 26, 1938, in the Court Room of the United States District Court for the Western District of Kentucky, at Louisville, Jefferson County, Kentucky, before a Statutory Three-Judge Court convened for the purpose of determining plaintiff's application for a preliminary injunction, by order heretofore entered herein, by the Honorable Mac Swinford, United States District Judge for the Eastern and Western Districts of Kentucky, by calling to his assistance the Honorable Elwood Hamilton, Judge of the Circuit Court of Appeals for the Sixth Circuit, and the Honorable Robert R. Nevin, United States District Judge for the Southern District of Ohio, pursuant to Section 266 of the Judicial Code, whereupon Mr. Goldsmith, attorney for the plaintiff, introduced to the Court his associate counsel, Mr. Howell Ellis, of the Indianapolis, Indiana, bar, and the plaintiff, Ziffrin, Incorporated, by counsel, tendered and offered to file its written motion that it be granted a preliminary injunction against the defendants conformably with the prayer of plaintiff's Bill of Complaint herein, to which motion defendants, by counsel, objected, and in support of said motion plaintiff tendered and offered to file the affidavit of Sam Ziffrin, dated July 23, 1938, the affidavit of M. F. Chandler dated July 22, 1938, the affidavit of Milton Grabfelder, dated July 25, 1938, the affidavit of Edward Gusky, dated July 25, 1938, the affidavit of Edward W. Schalk, dated July 25, 1938, and the affidavit of Frank H. Luther, dated July 25, 1938, and plaintiff also tendered and offered to file the Transcript of Testimony heard in this cause on July 19, 1938, upon plaintiff's motion for a temporary restraining order, but plaintiff, by counsel, expressly stated that it did not presently offer said Transcript in evidence, whereupon the defendants, by counsel and in writing, tendered and offered to file their written motion to dismiss the said Bill of Complaint and to dissolve the temporary restraining order granted and issued thereon herein on July 19, 1938, to which motions the plaintiff by counsel objected, whereupon the Court having heard the statements and arguments of counsel for the respective parties and having duly considered the mat-

ter, ordered and decreed that the aforesaid motion for a preliminary injunction, the aforesaid affidavits, the aforesaid Transcript of Testimony and the aforesaid motions to dismiss said Bill and to dissolve said temporary restraining order, be, and the same are, and each of them is, hereby ordered filed, and further ordered that the hearing of said cause upon said motion for a preliminary injunction be deferred for the present, and that counsel for the parties address themselves to argument of said motion to dismiss said Bill of Complaint and to dissolve said restraining order, and counsel for the respective parties of record, and Stanley B. Mayer, attorney for certain unidentified motor carriers not parties to this cause, thereupon did make statements and [fol. 47] arguments upon defendants' said motions, and the Court having heard said statements and arguments, and having considered the same, and the Court being of the opinion that it should take further time to determine the issue of the constitutionality or unconstitutionality of certain provisions of the Alcoholic Beverage Control Law, of the State of Kentucky, which Statute is known as Carroll's Kentucky Statutes, Sec. 2554 b-97 et. seq., in application to plaintiff's alleged business, and counsel for the respective parties having agreed that hearing upon said motion for a preliminary injunction and decision by the Court thereon might be deferred until after the Court shall have ruled upon and decided said motions to dismiss said Bill of Complaint and to dissolve said restraining order, and counsel for the respective parties having further agreed that the aforesaid temporary restraining order may be extended and continued in full force and effect until the Court shall have heard, ruled upon and determined the issues presented by said motion for a preliminary injunction, and counsel for defendants having stipulated and agreed to waive notice required by the Judicial Code to be given to the defendants and to the Governor and Attorney General of the Commonwealth of Kentucky of the contemplated future hearing of this cause upon said motion for a preliminary injunction as aforementioned, it was, and is, hereby ordered that this cause be, and the same is, hereby submitted upon said motion to dismiss said Bill of Complaint and to dissolve said restraining order, that counsel for the movant-defendants be, and they are, hereby granted until August 15, 1938, within which to file their brief in support of defendants' said motion, that counsel for plaintiff be, and they hereby are,

granted until September 1, 1938, within which to file their brief in opposition to defendants' said motion; and that counsel for defendants be, and they hereby are, granted five days after September 1, 1938, within which to file reply to plaintiff's brief; that hearing upon said motion for a pre-[fol. 48] liminary injunction be, and the same is, hereby ordered deferred until a day subsequent to the date upon which the Court rules upon said motion to dismiss said Bill of Complaint and to dissolve said restraining order; that the aforesaid restraining order be, and the same is hereby, ordered extended and continued in full force and effect until such time as the Court may have sustained said motions to dismiss said Bill and to dissolve said temporary restraining order or until such time as the Court shall have heard and determined said motion for a preliminary injunction, and that said restraining order shall be so continued in full force and effect upon the bond referred to therein and heretofore executed and until the further order of this Court; and that said hearing upon said motion for a preliminary injunction hereafter may be had without giving or service of notice to or upon the defendants, the Governor and Attorney General of the Commonwealth of Kentucky, or any of the—

This order signed and granted this 29 day of August, 1938.

Elwood Hamilton, Judge of the Circuit Court of Appeals for the Sixth Circuit. Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio Sitting by designation. Mac Swinford, Judge of the United States District Court for the Eastern & Western District of Kentucky. Have seen: Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenebaum, Attorneys for Plaintiff. Have seen: Hubert Meredith, Harry D. France, William Hayes, Attorneys for Defendants.

[fol. 49] IN UNITED STATES DISTRICT COURT

SECOND AMENDED BILL OF COMPLAINT—Filed September 26, 1938

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court, amends its Bill of Complaint as

heretofore amended, and for Second Amended Bill of Complaint herein, and for statement of cause of action against the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, states as follows:

1. On or about March 8, 1938, the defendant, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, the defendant, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, the defendant, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, by virtue of the authority of their said offices, nominated, constituted and appointed the defendant, William E. Baxter, Field Representative of said Kentucky Tax Commission and of said Kentucky State Alcoholic Beverage Control Board, and said William E. Baxter thereupon accepted said appointment, duly qualified as such Field Representative and ever since has been and now is the duly appointed, constituted and acting Field Representative of said Kentucky Tax Commission and of said Kentucky State Alcoholic Beverage Control Board.
2. At all times subsequent to January 1, 1935, the plaintiff has had, and now has, contracts with numerous persons and customers who are residents of and domiciled in Indianapolis, Indiana, Chicago, Illinois, and elsewhere in the States of Indiana and Illinois, and in other States, points and places situated North of the Ohio River, and which customers then had and maintained, and now have

and maintain, their principal offices and places of business and their business domiciles in the aforementioned [fol. 51] cities in the States of Indiana, Illinois and in other States and places lying North of the Ohio River as aforementioned, by which several contracts and for certain agreed hire and compensation to be paid plaintiff in said contracts mentioned and provided, the aforementioned customer-parties to said respective contracts agreed that plaintiff should carry and transport by motor vehicles shipments and consignments of whiskies, alcoholic liquors and distilled spirits purchased by said customers from whiskey distillers and from other persons engaged in the sale of such commodities, residing, domiciled and having their places of business in Louisville, Jefferson County, Kentucky, and within a radius of ten miles of the corporate limits of the said City of Louisville, by which contracts plaintiff was to receive from said distillers and vendors, shipments, consignments and cargoes of commodities of the kind aforesaid, to be delivered by said distillers and vendors to plaintiff at places in Louisville, Jefferson County, Kentucky, and within the ten mile radius aforementioned, consigned by said distillers and other vendors for delivery to plaintiff's said consignee-customers (the aforementioned purchasers of said whiskies, liquors and distilled spirits) at their respective residences, domiciles and places of business situated as aforesaid in said States of Indiana and Illinois, and in other States and places lying North of the Ohio River.

3. At all times subsequent to January 1, 1935, the aforementioned contracts between plaintiff and said consignee-customers have been and now are in full force and effect, and pursuant thereto and in conformity with the terms and provisions thereof, the plaintiff, for compensation and hire, has transported and carried from said City of Louisville and from within the area embraced in the aforesaid ten mile radius, to the City of Indianapolis, Indiana, to the City [fol. 52] of Chicago, Illinois, and to other points and places situated in the State of Indiana, in the State of Illinois and in other States lying North of the Ohio River as aforementioned, numerous large quantities, lots and cargoes of whiskies, alcoholic liquors and distilled spirits by motor vehicle, which aforesaid commodities were sold and consigned by the aforementioned whiskey distillers and

other vendors of said commodities to plaintiff's said consignee-customers, and which were so sold for delivery at said consignee-customers' respective places of residence, domicile and business location in the States of Indiana, Illinois, and other States lying North of the Ohio River, as aforementioned.

4. The said shipments and consignments were delivered by said whiskey distillers and other vendors of the aforesaid commodities to plaintiff at said City of Louisville, Kentucky, and in the area embraced in the ten mile radius aforesaid, consigned for direct and continuous transportation to the aforementioned points and places in the State of Indiana, in the State of Illinois and in other States lying North of the Ohio River, which last mentioned places were the designated destinations of said shipments and consignments, and plaintiff's said consignee-customers directed the plaintiff to carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation to the aforesaid designated destinations of said respective shipments and consignments, and plaintiff in conducting its business described in the original Bill of Complaint herein and in this present amendment thereto, and in performing its aforesaid contracts with said consignee-customers, did carry and transport said consignments and shipments by continuous and uninterrupted carriage and transportation by motor vehicles from said City of Louisville, and from the area embraced in the aforesaid ten mile radius, to its said consignee-customers' [fol. 53] respective places of residence, domicile and business location situated in the States of Indiana and Illinois, and in other States lying North of the Ohio River, as aforementioned.

5. At all of the times herein mentioned, the direct, convenient, usual and only commercially practical and feasible motor route from said City of Louisville and from said area embraced in said ten mile radius, to Indianapolis, Indiana, was and is over the certain route known as U. S. Highway No. 31, mentioned in the original Bill of Complaint herein. At all of the times herein mentioned, the direct, convenient, usual and only commercially practical and feasible motor vehicle route from said City of Louisville, Kentucky, to said City of Chicago, Illinois, was and is via Indianapolis as aforesaid, and thence over the cer-

tain routes and highways known as U. S. Highway No. 41 and U. S. Highway No. 52. At all of the times herein mentioned said three highways were, ever since have been and now are Federal Aid Highways established and maintained under the laws of the Congress of the United States and with the aid and assistance of funds and monies supplied and furnished by the Government of the United States. The plaintiff's transport and carriage operations mentioned in the original Bill of Complaint herein and in this present amendment thereto, necessarily have been and now are conducted over and along the aforesaid three Federal Aid Highways.

6. On July 1, 1935, and prior thereto, plaintiff was, ever since has been, and now is, in bona fide operation as a contract carrier of freight by motor vehicle for hire over and along the routes aforesaid, and each of them, and from and between the cities, points and places aforementioned, and elsewhere. On or about February 4, 1936, plaintiff duly and properly made, lodged and filed proper application [fol. 54] in writing to and with the Interstate Commerce Commission for a permit to be issued by said Interstate Commerce Commission authorizing plaintiff to engage in the business of a contract carrier of freight by motor vehicle for hire in interstate commerce on any public highway within the territory and over and along the routes aforementioned which were specified and identified in said application. At all times subsequent to the aforementioned filing thereof the aforesaid application has been, and now is, pending before and undetermined by said Interstate Commerce Commission.

7. At all of the times herein mentioned and under the laws of the Commonwealth of Kentucky, said City of Louisville was, and is, a City of the first class.

8. At all of the times herein mentioned the distillery plant of Joseph E. Seagram & Sons, Inc., mentioned in the original Bill of Complaint herein was, and now is, situated at a point lying less than ten miles from the corporate limits of said City of Louisville, and was and is situated at a place within the area embraced in the aforesaid ten mile radius.

9. Plaintiff withdraws, deletes and expunges from its Original Bill of Complaint herein as heretofore amended,

the words and figures following, and each of them, which were included in said Original Bill by mistake of the draftsman thereof, to-wit:

"and in the further business of accepting delivery of such goods, wares and merchandise at points situated in places and states other than Kentucky, for carriage and delivery by motor vehicle pursuant to special contracts, to persons residing and situated and doing business in said City of Louisville, and in delivering the same consistently with said undertakings of transport and carriage."

[fol. 55] 10. At all of the times herein and in the Bill of Complaint as heretofore amended herein mentioned and referred to, the business and operations of carriage and transportation of commodities of the kind and character aforesaid, conducted by plaintiff in the State of Kentucky, and described in the Bill of Complaint herein, as heretofore and as hereby amended, have consisted solely and exclusively in the carriage and transportation by motor vehicle, pursuant to special contracts, of goods, wares and merchandise of the kind and character aforesaid, delivered to the plaintiff for carriage and transport, and by the plaintiff carried and transported, in continuous and uninterrupted transit and carriage from the said City of Louisville and from the aforementioned area embraced in the aforesaid ten mile radius, to the aforementioned Cities and other points and places situated in the States of Indiana and Illinois, and in other States lying North of the Ohio River, for delivery to persons residing, domiciled and having their places of business in said States of Indiana, Illinois and other States lying North of the Ohio River. At all of the times aforesaid, plaintiff's aforesaid business of carriage of commodities of the kind and character aforesaid, has consisted and now consists solely and exclusively in the carriage and transportation of said commodities from the aforementioned points and places in Jefferson County, Kentucky, in exportation thereof from the State of Kentucky, in interstate commerce to points and places in the States of Indiana and Illinois, and in other States lying North of the Ohio River as aforementioned. In the period of one year next preceding July 1, 1938, and in the conduct of its aforementioned business of carrying and transporting the aforesaid interstate exports of said commodities the plaintiff realized net operating gains and profits in

an amount exceeding \$7500.00. Said business has been and is a growing and expanding business, and has present [fol. 56] prospects of substantial increase in extent, volume and net operating profits.

11. Plaintiff hereby makes defendant, William E. Baxter, a party hereto in his aforementioned official capacity.

12. Plaintiff incorporates by reference, reiterates and reaffirms each and all of the statements and allegations contained in its Bill of Complaint as amended herein except insofar as the same may be inconsistent with the statements and allegations herein contained.

Wherefore, the plaintiff, Ziffirin, Incorporated, prays that a subpoena and process issue herein against the defendant, William E. Baxter, Field Representative of the Department of Revenue of the Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board; prays further that temporary restraining order and that preliminary and permanent injunctions be adjudged, decreed, granted, entered and issued herein enjoining and restraining the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board; Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents, from bringing, and from threatening to bring, either directly or indirectly, and from permitting [fol. 57] to be brought, either directly or indirectly, any civil, criminal or penal action or proceeding whatsoever, either at law or in equity, for the purpose of enforcing, or attempting or threatening to enforce, the pretended Alcoholic Beverage Control Law identified in the Original Bill of Complaint herein, or any provision thereof, against the

plaintiff, its officers, representatives, agents or employees, or any of them, and from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic beverages whatsoever, carried and transported by plaintiff as a contract motor carrier for hire from any point or place in Jefferson County, Kentucky, consigned and destined for delivery to any point or place in the State of Indiana or in the State of Illinois, or in any State or place lying North of the Ohio River, and from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them, and from causing, or attempting, or threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested for violating any provision of said pretended Alcoholic Beverage Control Law, and from taking, and from attempting or threatening to take, any other action in any manner to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives, and automotive equipment, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them; prays further that the defendants, their successors, assistants, agents and deputies, and each of them, be ordered restrained and enjoined as aforesaid by preliminary injunction issued herein during the pendency of this cause; prays further that an order to show cause issue herein upon application of the plaintiff directed to [fol. 58] defendants requiring them to show cause why a preliminary injunction should not issue as aforesaid; prays further that a temporary restraining order issue herein pending the hearing of said order to show cause why a preliminary injunction should not be issued and granted herein; prays further that upon the hearings aforesaid, the said pretended Alcoholic Beverage Control Law be adjudged, decreed, declared and held to be unconstitutional, illegal, null and void, in application to the plaintiff, its officers, agents, employees, cargoes and automotive equipment engaged and transported in the course and conduct of plaintiff's aforesaid business operations; prays further that a perpetual and permanent injunction be granted and issued restraining the enforcement of said pretended Alcoholic Beverage Control Law as hereinabove prayed for; prays further for its costs herein incurred and expended, and for

all further, general and equitable relief to which plaintiff may appear to be entitled.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenebaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff.

Duly sworn to by Sam Ziffrin. Jurat omitted in printing.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER FILING SECOND AMENDED BILL OF COMPLAINT—Entered and Filed September 26, 1938

This day came the plaintiff by counsel and tendered his second Amended Bill of Complaint herein, and same is now ordered filed.

Mac Swinford, Judge.

IN UNITED STATES DISTRICT COURT

RECEIPT—Filed October 6, 1938

Come the defendants, by counsel, and hereby acknowledge that they have received from plaintiff's counsel this 21st day of September, 1938, three (3) copies of the Second Amended Complaint of the plaintiff, verified by Sam Ziffrin on September 19, 1938.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

CONSENT TO FILING OF SECOND AMENDED COMPLAINT—Filed October 6, 1938

Come the defendants in the above entitled action, by counsel, and hereby consent that the Second Amended Bill of Complaint of the plaintiff, Ziffrin, Incorporated filed in the

[fol. 60] office of the Clerk of this Court on the 26th day of September, 1938, may be filed with the papers in this action and may be made part of the record in this action.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William³ Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ENTRY OF APPEARANCE OF DEFENDANT WILLIAM E. BAXTER—
Filed October 6, 1938

Comes defendant, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky, and Field Representative of Kentucky State Alcoholic Beverage Control Board, by counsel, and without presently admitting that he is such Field Representative and without waiving any right or privilege he may have to file motions and answer herein, hereby enters his appearance to the complaint as amended, filed herein by the plaintiff, Ziffrin, Incorporated.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendant, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky, and Field Representative of Kentucky State Alcoholic Beverage Control Board.

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER FILING RECEIPT—Entered and Filed October 6, 1938

Comes this day the defendants and file Receipt of Second Amended Petition, Consent signed by defendants' counsel that said Second Amended Petition may be filed and Entry of Appearance of William E. Baxter, in official capacities, and same are noted of record.

Mac Swinford, Judge.

IN UNITED STATES DISTRICT COURT.

JOINT MOTION TO EXTEND MOTION TO DISMISS—Filed October 10, 1938

Come the plaintiff and the defendants, by their respective counsel, and jointly move the Court to enter an order herein ordering that defendants' motion to dismiss Complaint and to dissolve the Temporary Restraining Order issued herein thereon, which motion was filed herein on July 26, 1938, be regarded as amended and extended so as to extend to plaintiff's Complaint as Amended herein, including Second Amended Complaint filed September 26, 1938.

Hubert Meredith, Attorney General; Harry D. France, Asst. Attorney General; William Hayes, Asst. Attorney General; H. Appleton Federa, of Counsel, Attorneys for Defendants. Norton L. Goldsmith, Howell Ellis, Selligman, Goldsmith, Everhart & Greenbaum, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER FILING JOINT MOTION—Entered and Filed October 10, 1938

Come the plaintiff and the defendants, by their respective counsel and file joint motion moving that the pending motion to dismiss Complaint and Dissolve Temporary Restraining Order be extended to the Complaint as Amended, including Second Amended Complaint filed September 26, 1938, and same is noted of record.

Mac Swinford, Judge.

[fol. 62] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 15, 1938

Before Hamilton, Circuit Judge, and Nevin and Swinford, District Judges.

SWINFORD, District Judge:

The plaintiff, Ziffrin, Incorporated, filed its bill of complaint against the officers charged with the responsibility

of enforcing the liquor control laws of the State of Kentucky, and seeks to enjoin the enforcement of the provisions of the Alcoholic Beverage Control Law of Kentucky.

The defendant filed a motion to dismiss the plaintiff's bill.

The question for determination is the constitutionality under the federal constitution of the Alcoholic Beverage Control Law of Kentucky, enacted at the 1938 session of the General Assembly.

It is alleged that since March 20, 1933, and at all of the times involved, the plaintiff, Ziffrin, Incorporated, has been and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an interstate contract carrier of freight by motor vehicle for hire.

[fol. 63] On July 1, 1935, and prior thereto, plaintiff was in bona fide operation as a contract carrier by motor vehicle between Louisville, Kentucky, and Chicago, Illinois, and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highway, U. S. No. 31, from Louisville northwardly. On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which interstate contract carriers might file applications for permits. Prior to February 12, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit as an interstate contract carrier of freight for the aforementioned territory and route, which application has continued, and now continues, pending and undetermined before the Interstate Commerce Commission, with the consequence under Federal Motor Carrier Act, 1935 (U.S.C.A., Title 49, Sec. 309), that the continuance of plaintiff's operations has been and is lawful.

In October and November, 1936, plaintiff entered into contracts with Schenley Products Company and Joseph E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles consignments of whiskies to be delivered by said bailors to the plaintiff in Louisville, Kentucky, consigned by bailors for delivery to the consignee-purchasers of said whiskies at such consignees' places or residence or business location in Chicago, Illinois, and in points other than the State of Kentucky. These contracts have continued to be and are in full force and effect; the plaintiff has carried

large quantities of whiskies pursuant thereto and conformably therewith and plaintiff has done like and similar business with and for other customers.

The direct, convenient and usual motor vehicle route from Louisville to Chicago is via Indianapolis over U. S. Highway No. 31, and that route has been used and employed by plaintiff in its operations.

[fol. 64] The transportation of this whiskey has been the principal part of plaintiff's business and that business has been and is an established and profitable one.

The business has been interstate commerce exclusively.

During the year preceding July 1, 1938, plaintiff owned and operated seven trucks, operated a total of twenty-five trucks, employed forty men, and had in the business a capital investment in excess of \$10,000.00.

On March 7, 1938, the Governor of Kentucky approved the Alcoholic Beverage Control Law known as Carroll's Kentucky Statutes, Sec. 2554b-97, et seq.

Plaintiff previously had complied with all requirements of Kentucky laws governing licenses, certificates and process agent.

Insofar as its license provisions are concerned, this law became effective July 1, 1938, and it thereupon became incumbent upon plaintiff, if it were to continue its aforementioned business conformably with the terms of the law, to have a Transporter's License. 1938 Supplement to Carroll's Kentucky Statutes Sec. 2554b-190.

Section "18" of the Act, referred to in this Statute is subsection 7 of Section 2554b-114, Carroll's Kentucky Statutes.

In order to be eligible to obtain the Transporter's License from the Department of Revenue, it was necessary for plaintiff to have a common carrier's certificate from the Division of Motor Transportation. 1938 Supplement to Carroll's Kentucky Statutes, Sec. 2554b-154 (7).

On May 25, 1938, plaintiff applied for a Liquor Transporter's License, paid the required fee, and with surety executed the bond required therefor, and on June 7, 1938, plaintiff applied to Division of Motor Transportation for [fol. 65] a common carrier's certificate to operate a motor freight line from Louisville, Kentucky, to the Indiana State line over U. S. Highway No. 31, and in interstate commerce only.

On or about June 30, 1938, plaintiff's application for a common carrier's certificate was denied; plaintiff thereby

was rendered ineligible to obtain or to receive a Transporter's License and on July 8, 1938, the Commissioner of Revenue and the Alcoholic Beverage Control Board denied the application for a Transporter's License on the ground that it did not hold a common carrier's certificate.

The Bill charges the law to be unconstitutional insofar as it assumes to bar plaintiff from engaging in interstate commerce as a contract carrier. The Bill, as amended, charges the law to contravene the Commerce Clause, the Due Process and Equal Protection Clauses.

Counsel for the plaintiff contend that this statutory three judge court has no jurisdiction to entertain the motion to dismiss. An examination of the cases cited to support this plaintiff's claim reveals that two of them were decisions rendered before Section 266 of the Judicial Code (Title 28 U.S.C.A. Sec. 280) was amended in 1925. This Amendment added the last sentence to Section 266 of the Judicial Code (28 U. S. C. A. § 380), which is as follows: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The amendment expressly states that the three judge court must sit in final hearing and hence grant a final decree.

[fol. 66] The Supreme Court, in the case of *Stratton, etc. v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14, said: "By the amendment of February 13, 1925 (43 Stat. 938), the provision with respect to the presence of three judges was made to apply to the final hearing in such suit in the District Court, and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this court." * * * "These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by these judges on the application for an interlocutory judgment."

Under the Act, as amended, the three judge court has the same power as a single district judge. It is in fact a district court composed of three judges instead of one. One of the questions for determination is the sufficiency of the pleadings to state a cause of action. The only way in which

this can be determined is to decide whether or not the Kentucky Statute is constitutional.

We are of the opinion that this three judge court has authority to rule upon this motion to dismiss.

If this Act of the Kentucky Legislature does not violate the guarantees under the federal constitution to those engaged in interstate commerce it is valid only because it is a reasonable exercise of the police power of the sovereign State of Kentucky.

[fol. 67] The legislature determines what regulations are proper and necessary in the exercise of the police power and it is not for the courts to pass upon the wisdom, policy or expediency of the laws passed in exercising this sovereign power. *Halter v. Nebraska*, 205 U. S. 34. In this case Mr. Justice Holmes in the opinion laid down the basic rule of construction in the following language: "In our consideration of the questions presented we must not overlook certain principles or constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

It then becomes the duty of the courts to determine what are proper subjects for the exercise of this power, what constitutional restrictions and limitations must be applied and whether the statute in question is a reasonable exercise of the power. In this connection the courts may apply certain tests to the legislation and may judicially determine whether the law has a real and substantial relation to the public welfare, safety and health and actually tends in some real degree to promote these objects. *Mugler v. Kansas*, 123 U. S. 623.

The basis of the police power lies in the constitution which regards the public welfare, safety and health of the citizens of that state. However, a close examination of the authority [fol. 68] ties will show that whenever there is a conflict be-

tween the police power and the constitution the courts will construe the constitution to fit in with the police regulations if at all reasonable.

In the case of *Townsend v. Yeomans*, 301 U. S. 441, the court said: "The case calls for the application of the well established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Savage v. Jones*, 225 U. S. 501, 523; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U. S. 493, 510; *Carey v. South Dakota*, 250 U. S. 118, 122; *Lehigh Valley R. Co. v. Public Utilities Comm'n*, 278 U. S. 24, 35; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm'rs*, 283 U. S. 380, 392, 393; *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 158."

The expressly granted power of the federal government to regulate interstate commerce and the power of the individual states to enact regulations for their internal police are coordinate powers which each must respect. The states jealously guard the prerogative duty of protecting the public safety, health and morals. Courts have consistently recognized this right. Necessarily the progress of time has broadened rather than limited the construction placed upon the commerce clause of the Constitution. The fundamental law vitalized by the vigorous opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton 1, has been consistently adhered to and extended. In the light of intervening events any other interpretation would appear almost absurd. If progress is to continue future generations looking back upon this period must find the courts equally as farsighted and practical.

[fol. 69]. The Courts with equal consistency have respected the right of the states as the proper governmental agency, to enact and enforce reasonable police regulations. Under our dual system of government both are equally necessary and must be preserved entire, but neither can be so exercised as to materially affect or encroach upon the other. State laws, not primarily aimed at commerce, but intended as legitimate exertions of the authority of the state to provide for the public safety, health and morals of the citizens of that state are not invalid because they may re-

motely or incidently impose restrictions on interstate commerce. *Sherlock v. Alling*, 93 U. S. 99.

The question whether the power of Congress to regulate interstate commerce is exclusive or whether the states have a concurrent authority to any extent, over the same subject is the most difficult which has arisen in the construction of this clause of the Constitution. An examination of the authorities might reveal a division into four classes of guiding rules.

First the states cannot lawfully enact measures tending directly to regulate, obstruct or interfere with such commerce as is confided to the paramount control of Congress or which may be inconsistent with the legislations of Congress on the same subject. I think it is within this first class that the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, cited by counsel for plaintiff Fall. See opinion giving many illustrations.

Second, if the particular subject to which the power is to be directed is national in its character or is such that it can properly be regulated only by a uniform system, to such an extent that varying regulations by the individual states would cause inconvenience and be a detriment, it is not competent for the states to legislate on the subject, and if Congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation and restriction.

[fol. 70] The rule is laid down in the case of *Sligh v. Kirkwood*, etc., 237 U. S. 52, 58. "That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, 230 U. S. 352."

The same rule of law is emphasized in the more recent case of *Townsend v. Yeomans*, *supra*, in which it was said: "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for

we are of the opinion that, if it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people."

Third, state legislatures may regulate matters local and limited and which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their localities and on which Congress has not expressly legislated. *Cooley v. Board of Wardens*, etc., 12 How. 299; *United States v. Adair*, 152 Fed. 727.

Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect interstate commerce, are not intended as regulations thereof, but have their primary concern for the public health, safety, and welfare of the citizens of the particular state and which are [fol. 71] properly in the nature of police regulations. If these laws are reasonable and bona fide and there is no Act of Congress expressly covering the same ground, they are valid. And it is understood that in so far as they relate to, or affect commerce Congress, by refraining from acting on the same subject, sanctions and adopts them. It is within this fourth class, if any, that the case at bar falls.

By the Webb-Kenyon Act, 27 U. S. C. A. 122, passed in 1913, Congress recognized a condition which only national legislation could meet. To prevent the importation of liquor from a "wet" state into a "dry" state an adequate and complete law was enacted.


Prior to this in 1890, Congress had enacted the Wilson Act, 27 U. S. C. A. 121.

From these enactments and the construction placed upon them by the courts it is seen that Congress has carefully considered the interstate shipment of liquor and has expressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar.

Counsel for the defendants insist that this case is covered by the wording of the Webb-Kenyon Act.

This Act provides: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but

MICRO CARD

TRADE MARK 

22

39



1021

65



subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person [fol. 72] interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The defendants insist that this language expressly gives the states a right to enact legislation pertaining to the exportation of liquor and cite as their authority the case of *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 590, 110 A. L. R. 919.

In this case the Pennsylvania court construed the Webb-Kenyon Act as giving this right to the states in express terms. In the opinion it said: "While the Webb-Kenyon Act was primarily aimed at the importation of intoxicating liquors into a state, in violation of the laws of that state, it also includes in express terms the interstate transportation of all liquor 'in any manner used * * * in violation of any law of such State.'" 27 U. S. C. A. §122. We have no doubt of the state's power to condemn and forfeit both the liquors so unlawfully transported and the vehicle used in such unlawful transportation."

With this construction of the Webb-Kenyon Act we cannot agree. This Act was passed in our judgment to deal wholly with importation.

It is interesting to note the history of this class of federal legislation. In 1887 the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*, 125 U. S. 465, laid down the rule that a statute of a state, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a license from a county court of the State, is, as applied to a sale by the importer, and in the original pack- [fol. 73] age or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.

This was followed in 1889 in the case of *Leisy v. Hardin*, 135 U. S. 100.

In 1890, apparently as an outgrowth of these two decisions, Congress enacted the Wilson Act, 27 U. S. C. A. 121, which provides as follows: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Following this was the Webb-Kenyon Act in 1913. This Act was held not to have been repealed by the National Prohibition Act nor the Eighteenth Amendment under which it was enacted, in *McCormick & Co., v. Brown*, 286 U. S. 131; 52 Sup. Ct. 522; 76 L. Ed. 1017; 87 A. L. R. 448.

The Twenty-first Amendment provides in Section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In the light of the authorities cited, it can well be reasoned that where Congress has legislated upon importation, had this important subject before committees and under debate [fol. 74] and deliberately failed to enact legislation dealing with exportations in interstate commerce it has thereby deliberately invited each state to make its own laws governing this particular field evidently acutely conscious of the fact that each state was better qualified to give its own citizens the character of laws which applied to the local problems.

This is a most practical matter and must be dealt with in a practical way.

Modern means of transportation are so efficient that state police powers should be broadened rather than more narrowly confined. What is a reasonable regulation today may have been an unreasonable regulation in the days of dirt roads and horse drawn vehicles.

With broad, well paved highways and high powered motor vehicles, with airplanes and open airways, by both means

of which large quantities of intoxicating liquors can be transported across state lines in a short space of time, it becomes a practical impossibility to accurately check the output of plants engaged in its manufacture. It cannot therefore be said to be unreasonable to require its transportation to the state line by regularly engaged transportation services, with fixed termini and maintaining definite schedules for handling shipments of goods. While it may be suggested and has been inferred by plaintiff's counsel that this law was enacted to give some particular class engaged in the transportation business an advantage over those of the same class as his client, this cannot be said to reflect upon the reasonableness of the regulation itself. We must presume that the legislature sought to enact a measure which it believed to be for the good of the state and its citizens, and are here called upon to pass upon the constitutionality of the legislation, not upon the motives of the majority of the members of the legislature and the Governor who signed the bill.

The cases cited by counsel for the plaintiff and relied upon by them treat principally with the general rules of inter-[fol. 75] state commerce. We think it is well for us to confine ourselves to the cases dealing with the particular product involved herein. That of alcoholic beverages. The celebrated case of *Mugler v. Kansas*, 123 U. S. 623, emphasizes this fact. The Supreme Court in its opinion reviewed many authorities and had this to say: "In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitu-

tion of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Here is a product which is generally recognized by its nature to be peculiarly subject to regulation under the police power. It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority. There is no federal regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or rights-of-ways within the borders of the state. The lack of national legislative control is conspicuous.

[fol. 76] We think the language of the Supreme Court in the case of *Sherlock v. Alling, etc.*, 93 U. S. 99, might be applied to the case at bar. "In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or executed a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

Further on in the opinion the Court said: "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its

territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

[fol. 77] "That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales." Black's Constitutional Law, Third Series, pg. 402.

Since intoxicating liquor is universally recognized as a legitimate subject over which the states may exercise the police power, even to the extent of denying the right to manufacture, it cannot be consistently held that they may permit it to be manufactured, but then lose complete control of what is done with it.

If the state can arbitrarily grant or withhold the right to manufacture liquor on the theory that the nature of the product was something that authorized strong regulation, then that regulation should certainly continue so long as the admittedly dangerous element is within the borders of the state. It does not lose its dangerous element by being [fol. 78] merely labeled for exportation to a foreign state or country, even though it might incidentally interfere with interstate commerce.

It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks operating in Kentucky under a contract carrier's license. They have no schedule,

no fixed route, and no definite termini. It would be an impossibility to determine the quantity or distinction, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat *here* citizens than to permit the manufacture and sale of liquor but have nothing to say about its handling while within the borders of the state.

The Pennsylvania Supreme Court, in the case of *Commonwealth v. One Dodge Motor Truck*, *supra*, in this connection said: "The foregoing decisions leave no doubt that the Commonwealth of Pennsylvania has the power to prohibit the manufacture of alcoholic liquors within its borders. And this is so, even though such liquors are intended for shipment only out of the state. *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. The power to prohibit absolutely includes the power to prohibit conditionally, or to impose reasonable regulations or conditions on such manufacture. *Eberle v. Michigan*, 232 U. S. 700, 34 S. Ct. 464, 58 L. Ed. 803; *Com. v. Vigliotti*, 271 Pa. 10, 115 A. 20, affirmed *Vigliotti v. Pennsylvania*, 258 U. S. 403, 42 S. Ct. 330, 66 L. Ed. 686; *Com. v. Stofchek*, *supra*. "The greater power includes the less." *Seaboard Air Line Ry. v. North Carolina*, *supra*. It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicat-[fol. 79] ing liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor-trucks, and motor vehicles constitute the greatest difficulty. This was recognized by the Supreme Court of the United States in *United States v. Simpson*, *supra*, where the opinion writer, Mr. Justice Van Devanter, said, speaking of the "Reed Amendment", *supra*: "Had Congress intended to confine it to transportation by railroads and other common carriers it may well be assumed that other words appropriate to the expression of that intention

would have been used: And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, autotrucks and other private vehicles that it would not be of much practical benefit." 252 U. S. 465, at page 467, 40 S. Ct. 464, 64 L. Ed. 665, 10 A. L. R. 510."

We are of the opinion that this is a valid and reasonable regulation under the police power and does not contravene the Commerce, Due Process or Equal Protection Clauses of the Federal Constitution.

The action should be dismissed.

(Signed.) Mac Swinford, Judge, Eastern and Western Districts of Kentucky.

[fol. 80] IN UNITED STATES DISTRICT COURT

THIRD AMENDED COMPLAINT—Filed November 22, 1938.

The plaintiff, Ziffrin, Incorporated, before answer filed and by leave of Court, amends its Complaint as amended herein, and for third amendment thereto; and for further statement of its cause of action against the defendants herein, states as follows:

(1) The determination and decision of D. C. Moore, Director of the Division of Motor Transportation of the Commonwealth of Kentucky, that plaintiff was not eligible to receive a Common Carrier's Truck Certificate, a certificate of public convenience and necessity, which decision and determination were rendered by him on or about June 30, 1938, pursuant to a hearing had June 23, 1938, upon plaintiff's application for issuance to it of said Certificate, all as in the original complaint herein mentioned and referred to, were based and rested upon the ground, expressed and assigned by said Commissioner in writing, that plaintiff had been, and was, engaged in conducting the business of [fol. 81] a contract carrier of freight by motor vehicle for hire, and that plaintiff had not been, and was not, engaged in the business of a common carrier of freight by motor vehicle for hire.

(2) The consignments and cargoes of whiskies, alcoholic liquors and distilled spirits delivered to plaintiff in Jefferson County, Kentucky, by the consignors thereof for trans-

portation and carriage therefrom to places situated North of the Ohio River, all as alleged in said complaint as amended; have been, are, and will be, delivered to plaintiff with the intent, purpose and directions of said consignors, communicated to the plaintiff, that said consignments and cargoes, and each of them, should be, and shall be, immediately transported, carried and delivered by plaintiff to the respective consignees of said consignments and cargoes as alleged in said complaint as amended.

(3) The civil, criminal, penal and confiscatory actions and proceedings, institution and prosecution of which against plaintiff, its officers, agents, employees, automotive equipment, and cargoes, all in the complaint as amended herein mentioned and referred to and therein alleged to be intended and threatened by defendants, in number are, and will be, in excess of ten, and are, and will be and will prove, vexatious, unwarranted and unjustified, unless defendants are enjoined as sought herein.

(4) Plaintiff reiterates and reaffirms each and all of the statements and allegations contained in its Complaint as heretofore amended herein, except insofar as the same may be inconsistent with the statements and allegations herein contained.

[fol. 82] Wherefore, the plaintiff, Ziffirin, Incorporated, prays judgment and equitable relief against the defendants, and each of them, as in its complaint as amended herein.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky. Howell Ellis, 520 Illinois Building, Indianapolis, Indiana. Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' ACKNOWLEDGEMENT OF RECEIPT OF COPIES OF
PLAINTIFF'S THIRD AMENDED COMPLAINT AND CONSENT
THAT SAID AMENDMENT MAY BE FILED—Filed November
22, 1938

☞ Come defendants in the above entitled action, by counsel, and hereby acknowledge receipt from plaintiff of three (3)

copies of the Third Amended Complaint of the plaintiff, Ziffrin, Incorporated, and hereby consent that the said Third Amended Complaint may be filed and made part of the record herein.

Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of counsel, Frankfort, Ky., Attorneys for Defendant.

[fol. 83] IN UNITED STATES DISTRICT COURT

JOINT MOTION TO EXTEND MOTION TO DISMISS—Filed November 22, 1938

Come the plaintiff and defendants, by their respective counsel, and jointly move the Court to enter an order herein ordering that defendants' motion to dismiss complaint as amended and to dissolve the temporary restraining order issued herein, which motion was filed herein on July 26, 1938, be regarded as amended and extended so as to extend to plaintiff's complaint as amended herein, including the Third Amended Complaint filed herein.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Ind.; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff. Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

WAIVER OF NOTICE—Filed November 22, 1938

Come Honorable Albert B. Chandler, Governor of the Commonwealth of Kentucky, in person, and the defendants in the above entitled action (including in their number Hubert Meredith, Attorney General of the Commonwealth of

Kentucky), by counsel, and hereby waive the notice required by the Judicial Code, Section 266, as amended, of the motions and applications heretofore filed and made in said action by the plaintiff, Ziffrin, Incorporated, on July 26, 1938, respectively, that plaintiff be granted:

(1) A preliminary injunction; and

(2) An injunction pending the appeals to be prosecuted by the plaintiff to the Supreme Court of the United States from the final judgment of the Statutory Three-Judge Court to be entered in said action conformably with the Court's Opinion therein, dated October 15, 1938,

[fol. 84] and similarly waive notice required as aforesaid of the hearing by the Court of said motions and applications, and each of them.

A. B. Chandler, Governor of Commonwealth of Kentucky; Hubert Meredith, Attorney General of Commonwealth of Kentucky; Harry D. France, Assistant Attorney General of Commonwealth of Kentucky; William Hayes, Assistant Attorney General of Commonwealth of Kentucky; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.

[fol. 85] IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered and Filed November 22, 1938

This cause having come on for hearing before a Statutory Three-Judge Court heretofore duly convened by order heretofore entered herein by the Honorable Mac Swinford, Judge of the United States District Courts for the Eastern and Western Districts of Kentucky, by calling to his assistance the Honorable Elwood Hamilton, Judge of the United States Circuit Court of Appeals for the Sixth Circuit, and the Honorable Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio, pursuant to Section 266 of the Judicial Code, as amended, and the plaintiff having tendered and moved to file (a) its Third Amended Complaint herein, (b) Acknowledgment by Defendants of Receipt of Copies of said Third

Amendment and Consent of Defendants that said Third Amendment May Be Filed, and (c) written Waiver of Notice of Albert B. Chandler, Governor of the Commonwealth of Kentucky, and of the defendants, including the Attorney General of the Commonwealth of Kentucky, waiving notice required by the Judicial Code, Section 266, of the filing; making and hearing of plaintiff's hereinafter mentioned motions and applications for a preliminary injunction and [fol. 86] for an injunction pending appeal, and the parties hereto, by their respective counsel, also having tendered their Joint Motion that defendants' motion, tendered July 26, 1938, to dissolve the temporary restraining order issued and granted herein on July 19, 1938, and to dismiss the complaint as amended herein, be regarded as amended and extended so as to extend to plaintiff's complaint as amended, including said Third Amendment, and the parties hereto, by counsel, also having tendered their second Joint Motion that the liability of the plaintiff, as principal, and of Fidelity & Deposit Company of Maryland, as surety, upon the temporary restraining order bond executed herein on July 19, 1938, be reduced to the penal sum and amount of Two Thousand Dollars (\$2,000.00), and the Court having ascertained that said tendered Third Amended Complaint in no wise changes or alters the grounds upon which plaintiff claims to be entitled to equitable relief herein, and the Court having sufficiently considered the matter and being sufficiently advised, it is now and hereby ordered, adjudged and decreed as follows, to wit:

(1) That the aforesaid Third Amended Complaint, Acknowledgment by Defendants of Receipt of Copies of said Third Amendment and Consent of Defendants that said Third Amendment May Be Filed herein, the aforesaid written Waiver of Notice, and the two aforesaid Joint Motions, be, and the same are, and each of them is, hereby ordered filed and made part of the record herein;

(2) That the aforesaid Joint Motion that defendants' aforesaid motion to dissolve the aforesaid restraining order and to dismiss the complaint herein be extended as aforesaid, be, and the same is, hereby sustained, and it is hereby ordered that the said motion to dissolve said restraining order and to dismiss said complaint be, and the same is, [fol. 87] hereby extended to plaintiff's Complaint as Amended herein, including said Third Amended Complaint;

(3) That the aforesaid Joint Motion to reduce the liability of said principal and surety upon the aforesaid temporary restraining order bond executed July 19, 1938, be, and the same is, hereby sustained, and it is hereby ordered that the liability of the plaintiff, as principal, and of said Fidelity & Deposit Company of Maryland, as surety, upon said bond, be, and the same is, hereby reduced to the penal sum and amount of Two Thousand Dollars (\$2,000.00), said reduction in liability to be effective from and after the date of the entry of this order and judgment;

(4) That so much of the order entered herein on August 29, 1938, as ordered that hearing of this action on the plaintiff's motion, tendered herein on July 26, 1938, that plaintiff be granted a preliminary injunction, be deferred, is hereby vacated, set aside and held for naught, and it is now and hereby ordered that this action be, and the same is, hereby submitted upon plaintiff's said motion that it be granted a preliminary injunction;

(5) That the Opinion of the Court heretobefore filed herein, and dated October 15, 1938, be, and the same is, hereby extended to the complaint as amended herein, said Third Amended Complaint included, and is made a part of the record herein, and it is further and hereby ordered that said Opinion shall, and does, constitute the Court's Conclusions of Law, which solely and exclusively constitute the grounds of the Court's action taken herein with respect to the plaintiff's aforementioned motion that it be granted a preliminary injunction, with respect to defendant's aforementioned motion that the aforesaid temporary restraining [fol. 88] ing order be dissolved and that the aforesaid complaint as amended be dismissed, to which Conclusions of Law, and each of them, plaintiff asks, and is hereby granted, exceptions;

(6) That this action having been heard and duly submitted upon plaintiff's said motion for a preliminary injunction and upon defendants' aforesaid motion to dissolve the aforementioned temporary restraining order granted July 19, 1938, (and continued and extended in full force and effect by the aforesaid order entered August 29, 1938) and to dismiss the said complaint as amended, it is now and hereby ordered, adjudged and decreed that plaintiff's said motion for a preliminary injunction be, and the same is,

hereby overruled, that defendants' said motion to dissolve said restraining order and to dismiss said complaint as amended be, and the same is, hereby sustained, that said temporary restraining order be, and the same is, hereby dissolved, that said complaint as amended be, and the same is, hereby dismissed, and that the defendants recover of the plaintiff the defendants' costs herein incurred and expended, to which rulings of the Court, and each of them, the plaintiff objected, and said objections having been overruled, the plaintiff asked, and is hereby granted, exceptions.

(7) From the statements contained in the plaintiff's verified complaint as amended herein and from the affidavits tendered herein by the plaintiff on July 26, 1938, and ordered filed by the aforesaid order entered August 29, 1938, the Court is of the opinion that plaintiff will lose its transportation contracts mentioned in said complaint, that plaintiff's business described in said complaint will be destroyed, and that irreparable damage will result to the plaintiff pending appeal herefrom to the Supreme Court of the United States if this judgment shall be reversed [fol. 89] upon such appeal, and the plaintiff on October 20, 1938, having announced its intention to prosecute an appeal herefrom to the Supreme Court of the United States and having tendered its motion that it be awarded an injunction pending such appeal, and it appearing that the defendants, including the Attorney General of the Commonwealth of Kentucky, and the Governor of the said Commonwealth have waived notice of the application for said injunction pending appeal and of the hearing thereof, as aforesaid, and defendants having offered no evidence in opposition to said motion and application, and the Court having heard statements of the parties' respective counsel with respect to said motion and application, and having sufficiently considered the matter and being sufficiently advised, it is now and hereby further ordered, adjudged and decreed that plaintiff's said motion for an injunction pending said appeal be, and the same is, hereby ordered filed, that this action be, and the same is, hereby submitted upon said motion, and that said motion be, and the same is, hereby sustained to the extent and upon the conditions hereinafter set forth. Said injunction pending said appeal is hereby allowed and granted if the plaintiff shall execute and file herein a bond, with good and sufficient surety, ap-

proved by the Clerk of this Court, in the penal sum and amount of \$3,000.00, conditioned that the plaintiff will pay to the defendants all costs; losses and damages which may result to defendants from the granting of said injunction if it finally should be determined that the same was improperly granted to plaintiff. Said injunction pending appeal, granted upon the aforementioned condition precedent, is subject to defeasance and nullification, however, if within the time allowed by law, and by the Rules of said Supreme Court, the plaintiff fails to procure allowance of its aforementioned appeal, or, if plaintiff fails within due season properly to file, or to cause to be filed, with the Clerk of [fol. 90] the said Supreme Court the transcript of the record upon said appeal. Said injunction pending appeal, hereby granted upon the terms aforesaid, enjoins and restrains the defendants, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, William E. Baxter, Field Representative of the Department of Revenue of the Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, and each of them, their successors, assistants, deputies and agents—on the ground, or for the reason, that there has not been issued to plaintiff, and that plaintiff does not hold or possess a liquor Transporter's License issued by the Department of Revenue of the Commonwealth of Kentucky or by the Kentucky State Alcoholic Beverage Control Board—from bringing and from threatening to bring, either directly or indirectly, and from permitting to be brought, either directly or indirectly, any civil, criminal, penal or confiscatory action or proceeding, whatsoever, either at law or in equity, for the purpose of enforcing the Alcoholic Beverage Control Law enacted by the General Assembly of the Commonwealth of Kentucky at a Session thereof held in the year 1938, or any provision thereof, against the plaintiff, its officers, representatives,

agents or employees, or any of them; from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any distilled spirits, whiskies or alcoholic liquors whatsoever, carried and transported in interstate commerce by plaintiff as a contract motor carrier of freight for hire from any point or place in Jefferson County, Ken- [fol. 91] tucky, consigned and destined for delivery to any point or place in the States of Indiana or Illinois, or in any State lying North of the Ohio River; from seizing or confiscating, and from attempting or threatening to seize or to confiscate, any motor vehicle owned or operated by plaintiff and engaged in the aforesaid operations of transport and carriage, or any of them; from causing, and from threatening to cause, any of the plaintiff's officers, agents, representatives or employees to be arrested or prosecuted for violating any provision of said Alcoholic Beverage Control Law; and from taking and from threatening to take, any other action in any manner designed, intended or tending to impede, delay, hinder, molest or interfere with the plaintiff, its officers, agents, representatives and employees, or any of them, in conducting the aforesaid operations of transport and carriage, or any of them, pending said appeal.

This judgment signed and granted this 22nd day of November, 1938.

Elwood Hamilton, Judge of the United States Circuit Court of Appeals for the Sixth Circuit. Robert R. Nevin, Judge of the United States District Court for the Southern District of Ohio. Mac Swinford, Judge of the United States District Courts for the Eastern and Western Districts of Kentucky.

Have seen: Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Plaintiff.

Have seen: Hubert Meredith, Attorney General; Harry D. France, Assistant Attorney General; William Hayes, Assistant Attorney General; H. Appleton Federa, of Counsel, Frankfort, Kentucky, Attorneys for Defendants.

[fol. 92] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEALS TO THE SUPREME COURT OF THE UNITED STATES—Filed January 25, 1939

The plaintiff, Ziffrin, Incorporated, conceiving itself aggrieved by the order and judgment entered in the above entitled action on the 22nd day of November, 1938, by a Statutory Three-Judge Court, convened pursuant to the provisions of Section 266 of the Judicial Code, insofar as said order and judgment overrules and denies the motion of this plaintiff for a preliminary injunction enjoining and restraining the defendants as specified in said motion, and insofar as said order and judgment dissolves the temporary restraining order, and the continuation and extension thereof, heretofore granted, ordered and issued herein, hereby appeals to the Supreme Court of the United States from said order and judgment insofar as the same denies plaintiff's said motion for a preliminary injunction as prayed in said motion and insofar as the same dissolves said restraining order and the aforementioned continuation and extension thereof.

[fol. 93] The plaintiff conceiving itself further aggrieved by the said order and judgment entered herein as aforesaid, insofar as said order and judgment sustains the motion of the defendants herein to dismiss this plaintiff's complaint as amended herein, and insofar as said order and judgment directs the dismissal of said complaint as amended, and insofar as said order and judgment denies to this plaintiff a permanent injunction as prayed by plaintiff in said complaint, and insofar as the said order and judgment adjudges and orders that said complaint be dismissed and that the defendants recover of plaintiff their costs incurred and expended in this action, all of which motions were heard and determined by said Statutory Three-Judge Court, convened as aforementioned, hereby appeals to the Supreme Court of the United States from said order and judgment insofar as the same sustains the aforesaid motion of said defendants to dismiss said complaint and denies to plaintiff a permanent injunction and orders and adjudges that said complaint as amended be dismissed and that defendants recover of plaintiff their costs incurred and expended in this action.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the Assignment of Errors

filed herewith, pertaining to the portions of said order and judgment, therein specifically designated, and from which appeals are prayed as herein set forth.

Plaintiff states that said order and judgment and the several provisions thereof herein and in said Assignment of Errors complained of, and the said Court's aforementioned several decisions and rulings, in the particulars aforesaid are, and each of them is, greatly to the prejudice and injury [fol. 94] of plaintiff, and are, and each of them is, erroneous and inequitable.

Wherefore, in order that plaintiff may obtain relief in the premises and be afforded opportunity to show the errors complained of, plaintiff, Ziffrin, Incorporated, prays that it be allowed appeals in said action and from the aforesaid order and judgment to the Supreme Court of the United States conformably with the Statutes and the Rules of said Supreme Court in such case made and provided, that proper orders touching the security required of plaintiff be made, that a citation be issued upon the allowance of said appeals directed to the defendants herein, James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, Emory G. Dent, Member of Kentucky Tax Commission and Member of Kentucky State Alcoholic Beverage Control Board, C. M. C. Porter, Member of Kentucky Tax Commission and Member of Kentucky Alcoholic Beverage Control Board, William E. Baxter, Field Representative of Department of Revenue of Commonwealth of Kentucky and Field Representative of Kentucky State Alcoholic Beverage Control Board, Hubert Meredith, Attorney General of the Commonwealth of Kentucky, and Harry D. France, Assistant Attorney General of the Commonwealth of Kentucky, commanding them, and each of them, to appear before the Supreme Court of the United States to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and judgment was made and entered, duly authenticated, be sent to the Supreme Court of the United States.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Kentucky. Howell Ellis, 520 Illinois Building, Indianapolis, Indiana. Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Kentucky.

[fol. 95] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 25, 1939

The plaintiff, Ziffrin, Incorporated, by counsel, respectfully represents that in the records and in the proceedings had in the above entitled action, in the rendition of the interlocutory orders and decrees herein appealed from, and also in the rendition of the final judgment herein appealed from, substantial errors were committed by the Statutory Three-Judge Court, heretofore convened herein conformably with the requirements of the Judicial Code, Sec. 266, which errors prejudicially affect plaintiff's substantial rights, and for the commission of which errors said judgment in the particulars and aspects referred to should be reversed, and as cause and grounds for such reversal the plaintiff makes the following assignment of errors, upon which plaintiff will rely in the prosecution of the appeals herein petitioned for in this action from the orders, decrees and judgment of this [fol. 96] Court entered in this action on the 22nd day of November, 1938, to-wit:

In the proceedings aforesaid said Court erred as aforementioned in the following particulars, to-wit:

(1) In the rendition of said interlocutory decree,—in denying and overruling plaintiff's motion, filed July 26, 1938, seeking and praying a preliminary injunction;

(2) In the rendition of said interlocutory decree,—in sustaining defendants' motion, filed July 26, 1938, to dissolve the temporary restraining order issued herein on July 19, 1938, and continued and extended by order entered herein on August 29, 1938, by said Statutory Three-Judge Court, by which continuance and extension said restraining order, in effect, was constituted and converted into a preliminary injunction;

(3) In the rendition of said final judgment,—in sustaining defendants' motion to dismiss the complaint as amended, and in thereupon dismissing said complaint and in adjudging that defendants recover their costs;

(4) In determining and ruling, in stating as its conclusions of law, and in making the same the grounds of its action in rendering the aforesaid decisions:—

(a) That the pretended Alcoholic Beverage Control Law of Kentucky, (being Chapter 2, pages 48, et. seq. of the 1938

Session Acts of the General Assembly of the Commonwealth of Kentucky of 1938, and being Carroll's Kentucky Statutes, Section 2554b-97, et. seq., hereinafter for convenience sometimes called merely "Law"), in application to the plaintiff—a contract carrier of freight by motor vehicle for hire, operating with and under the sanction of the Interstate Commerce Commission pursuant to the terms and provisions of Motor Carrier Act, 1935, and engaged in the State of Kentucky solely and exclusively in a long established and profitable business of carrying and transporting from Louisville, Jefferson County, Kentucky, and immediate environs in said Jefferson County, export cargoes of whiskies, liquors and alcoholic beverages there, and in pursuance of the terms of the contracts governing the sales of said intoxicants, delivered to plaintiff by vendor whiskey distillers and other vendors of such intoxicants, having their places of residence and business domicile in said Jefferson County, Kentucky, for transportation and carriage, and carried and transported by plaintiff in continuous and uninterrupted transit, to the consignee-purchasers of said intoxicants at such purchasers' respective places of domicile and residence in Indianapolis, Indiana, and at other points and places lying and situated North of said City of Indianapolis—in declaring plaintiff ineligible to continue to engage in such business, and in providing severe and extreme penalties and punishments for plaintiff, its responsible officers and employees so engaging, and in providing for the seizure and confiscation as contraband of automotive equipment owned, used and employed by plaintiff in such activities and for the seizure and confiscation as contraband of such cargoes so transported, does not contravene the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States;

(b) That said Law, in application to the plaintiff and to the plaintiff's aforesaid business, only remotely and incidentally affects interstate commerce, and that said Law does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of [fol. 98] commerce among the several States;

(c) That regulation by the General Assembly of the Commonwealth of Kentucky of the exportation of such intoxicants from Kentucky to sister States by motor carriers of

freight for hire, and said General Assembly's action in prohibiting interstate contract carriers of freight by motor vehicle for hire, including plaintiff, from continuing to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;

(d) That the Congress of the United States, by Motor Carrier Act, 1935, has not legislated with respect to the transportation of such intoxicants in export in interstate commerce by contract carriers by motor vehicle for hire;

(e) That National legislation governing and controlling interstate exportation and exports of the kind and character aforesaid is lacking;

(f) That the supposed omission of the Congress to legislate with reference to the subject of exportation of liquor in interstate commerce by contract carriers by motor vehicle for hire is equivalent and tantamount to an invitation by the Congress to each of the several States to make and enact its own laws governing said field of regulation;

(g) That such intoxicants, sold and consigned by the aforementioned vendors and consignors thereof for delivery to the aforesaid consignee-purchasers thereof domiciled and residing in Indianapolis, Indiana, and in points situated North thereof, and delivered to plaintiff, a contract-carrier of freight by motor vehicle for hire as aforesaid, in Jefferson County, Kentucky, intended and consigned for immediate, continuous and uninterrupted carriage for delivery to said consignees as aforementioned, are not to be regarded as being in interstate commerce or entitled to the protection of said Commerce Clause;

(h) That because it is competent for a State to prohibit the manufacture of such intoxicants; then if such State permits the manufacture thereof it is competent for such State to control such manufactured product, including power to control the transportation thereof in exportation from such State to a sister State in commerce among the several States;

(i) That State police powers should be broadened;

(j) That said Law, in application to plaintiff, and plaintiff's said business, in assuming, as it does assume, to require plaintiff, as a condition precedent to continuing to

engage in said business, to convert itself into a common carrier of freight by motor vehicle for hire, to assume the burdens and liabilities thereof, and to establish to the satisfaction of the Kentucky authorities that plaintiff's said operations are convenient and necessary in the public interest, does not constitute a taking of plaintiff's property without due process of law, and does not contravene the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States;

(k) That said Law's provisions, prohibiting plaintiff, because it is a contract (instead of a common) carrier of freight by motor vehicle for hire in interstate commerce as aforesaid, from continuing to engage in the conduct of its established and profitable and exclusively interstate exportation activities as aforementioned, is a valid and reasonable regulation within the proper exercise of the Police Power of the State;

(l) That said Law in providing, as it does provide, that common carriers of freight by motor vehicle for hire shall be eligible to do and transact the aforementioned business of transporting exports of intoxicants from Kentucky in [fols. 100-140] interstate commerce, and in declaring, as it does declare, contract carriers of freight by motor vehicle for hire, including plaintiff, to be ineligible to engage, or to continue to engage, in said business, and in providing penalties for violations of its provisions so extreme and severe as to preclude resort to the courts in ordinary course, does not deny the plaintiff the equal protection of the laws, and does not contravene the Equal Protection Clause of the aforesaid Fourteenth Amendment: and

(m) That in determining the validity of said pretended Law, it is incompetent for the Court to take cognizance of said General Assembly's obvious and transparent attempt and design to give common carriers of freight by motor vehicle for hire a competitive advantage over contract carriers of freight by motor vehicle for hire, by prohibiting the latter class of motor carriers from continuing to engage in the business aforesaid.

Wherefore, for each and all of the reasons set forth in the within and foregoing assignment of errors, plaintiff, Ziffrin, Incorporated, prays that each of said orders, decrees and

judgment herein appealed from, namely, said interlocutory orders and decrees and said final decree and judgment as hereinbefore set forth, be reversed with directions to the District Court of the United States, for the Eastern District of Kentucky, to set aside and vacate said orders and decrees and said judgment, and in lieu thereof to reinstate said restraining order and to render a decree and judgment in all respect- in accordance with the prayer of plaintiff's complaint as amended herein, and for all such further and equitable relief as to the Court may seem just and proper.

Norton L. Goldsmith, 615 Kentucky Home Life Building, Louisville, Ky.; Howell Ellis, 520 Illinois Building, Indianapolis, Indiana; Selligman, Goldsmith, Everhart & Greenbaum, 615 Kentucky Home Life Building, Louisville, Ky., Attorneys for Ziffirin, Incorporated, Plaintiff and Petitioner.

[fols. 141-142] Bond on appeal for \$1,000.00, approved and filed January 25, 1939, omitted in printing.

[fol. 143] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEALS—Entered and Filed January 25, 1939.

This day came the plaintiff, Ziffirin, Incorporated, by counsel, and tendered its Petition for Appeals to the Supreme Court of the United States from the interlocutory orders and decrees and from the final judgment rendered herein on the 22nd day of November, 1938, by the Statutory Three-Judge Court heretofore convened herein, pursuant to the requirements of Section 266 of the Judicial Code, and plaintiff simultaneously and further tendered its Assignment of Errors in support of its said Petition and its Jurisdictional Statement made in compliance with Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, together with the Appendices annexed to and referred to in said Jurisdictional Statement and incorporated as parts thereof, and likewise and further tendered its Appeal Bond in the penal sum and amount of One Thousand Dollars [fol. 144] (\$1,000.00) executed by plaintiff as Principal and

by United States Fidelity & Guaranty Co., a corporation, as Surety, and moved that the said papers and documents be filed, that said appeals be allowed, and that proper Citation be issued.

Thereupon, it is ordered by the Court:

(1) That the plaintiff's aforesaid motion be, and the same is, hereby sustained;

(2) That the aforesaid Petition for Appeals, Assignment of Errors, Jurisdictional Statement and Appeal Bond, be, and the same are, hereby filed herein and made part of the record in this action;

(3) That the aforesaid Appeal Bond and the surety thereon be, and the same are, and each of them is, hereby approved;

(4) That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its said Petition for Appeals be, and they are, and each of them is, hereby allowed as prayed in said Petition;

(5) That a transcript of such parts and portions of the record and proceedings herein as the parties may duly designate be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law and by the Rules of said Supreme Court;

(6) That citation be issued admonishing the defendants, and each of them, to be and appear in the Supreme Court of the United States within forty (40) days from this date as provided by law and the Rules of said Supreme Court.

This order signed and granted this 25th day of January, 1939.

(Signed) Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky.

[fols. 145-150] Citation, in usual form, showing service on Hubert Meredith et al., filed January 25, 1939, omitted in printing.

[fols. 151-163] IN UNITED STATES DISTRICT COURT

ORDER FILING ACKNOWLEDGMENT OF SERVICE—Entered and

Filed January 25, 1939

Plaintiff, Ziffrin, Incorporated, having this day tendered and offered to file defendants' acknowledgement of service of copies of plaintiff's Petition for Appeal to the Supreme Court of the United States, Assignment of Errors, Jurisdictional Statement and Order Allowing said Appeal, and of a statement directing defendants' attention to the provisions of Paragraph 3 of Rule 12 of the Rules of said Supreme Court, and the plaintiff having further tendered and moved the Court to file Defendants' Acknowledgment of Service of the Citation issued herein, it is ordered that the defendants' two aforementioned acknowledgments of service of the aforementioned papers and documents be, and the same are, hereby ordered filed as part of the record herein.

This order signed and granted this 25th day of January, 1939.

Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky.

[fol. 164] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 165] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION OF PARTS OF RECORD TO BE PRINTED BY CLERK, AND PROOF OF SERVICE—Filed February 20, 1939

The appellant, Ziffrin, Incorporated, states that the points upon which it intends to rely upon the prosecution of this appeal are those hereinafter set forth, and that appellant thinks the parts of the record hereinafter identified are necessary for the consideration of the aforementioned points and should be printed by the Clerk as part of the record herein, to-wit:

(A) Points Upon Which Appellant Intends to Rely:

1. The Statutory Three Judge Court below erred in overruling appellant's motion for a preliminary injunction;

2. The Statutory Three Judge Court below erred in sustaining appellees' motion to dissolve the temporary restraining order, and in dissolving the same;

3. The Statutory Three Judge Court below erred in sustaining appellees' motion to dismiss the complaint as amended, and in dismissing the same;

4. The Statutory Three Judge Court below further erred in determining and ruling and in stating as its Conclusions [fol. 166] of Law, and in making said Conclusions of Law the sole and exclusive grounds of said Court's action in rendering the aforesaid decisions, and each of them:

(a) That in application to appellant and its business, the 1938 "Alcoholic Beverage Control Law" of Kentucky complained of herein (hereinafter for convenience sometimes called merely "Control Law") does not contravene the Commerce Clause, Art. 1, Sec. 8, Cl. 3, of the Constitution of the United States;

(b) That in application to appellant and its business, said Control Law only remotely and incidentally affects and burdens interstate commerce, and that said Control Law does not represent and constitute a direct and substantial burden upon, interference with, and obstruction and prohibition of, commerce among the several states;

(c) That the regulation by the General Assembly of the Commonwealth of Kentucky of the transportation of alcoholic liquors by motor carriers of property for hire in export from Kentucky to sister states, and the said General Assembly's action—manifested by said Control Law—in attempting to prohibit interstate contract carriers of property by motor vehicles for hire, including appellant, from continuing to prosecute and to engage in such interstate exportation business, is a matter of local concern, as distinguished from a matter of National concern;

(d) That the Congress of the United States, by Motor Carrier Act, 1935, has not legislated with respect to transportation of said alcoholic liquors by contract carriers of property by motor vehicles for hire in export, in interstate commerce, from the state attempting such regulation;

(e) That National legislation governing and controlling interstate transportation, exportation, and exports, of the [fol. 167], kind and character aforesaid is lacking;

(f) That the supposed omission of Congress—erroneously supposed by the Statutory Three Judge Court below to exist—to legislate with reference to the subject of transportation by contract carriers of property by motor vehicles for hire of alcoholic liquors exported in interstate commerce, is equivalent and tantamount to an invitation by the Congress to each of the several states to enact its own laws governing said supposed open field of regulation;

(g) That such alcoholic liquors sold and consigned by the vendors and consignors thereof, residing, domiciled and having their places of business in the City of Louisville, Jefferson County, Kentucky, and in the immediate vicinity of said City, to be delivered, pursuant to the contracts for the sale of said alcoholic liquors, to the consignee-purchasers of said liquors residing, domiciled and having their places of business in Indianapolis, Ind., Chicago, Ill., and at other points and places situated in states other than Kentucky and lying North of the Ohio River, and delivered to appellant in said City of Louisville, and its aforesaid immediate environs in Jefferson County, Kentucky, intended, consigned and destined for immediate, direct and continuous carriage and transportation for delivery to said consignee-purchasers at their aforementioned places of residence and business location, are not to be regarded as being in interstate commerce, and are not to be regarded as entitled to the protection of the aforesaid Commerce Clause of the Constitution of the United States;

(h) That because it is competent for a state to prohibit the manufacture of such alcoholic liquors, then if a state permits the manufacture thereof, it is competent for said state to control the manufactured product, which includes power to control the transportation thereof in exportation, in interstate commerce as aforementioned, from such state of manufacture to a sister state;

[fol. 168] (i) That state police powers should be broadened;

(j) That said Control Law, in application to appellant and its aforementioned export business, in assuming to require appellant—as a condition precedent to continuing to engage in its said business—to convert itself into a common carrier of property by motor vehicle for hire, to as-

sume the added burdens and stricter liabilities appertaining to such common carriers, and to establish to the satisfaction of Kentucky authorities that appellant's operations are convenient and necessary in the public interest, does not constitute a taking of appellant's property without due process of law, in contravention of the Due Process Clause of the 14th Amendment to the Constitution of the United States:

(k) That said Control Law's provisions prohibiting appellant, merely because it is a "contract" instead of a "common" carrier of freight by motor vehicle for hire in interstate commerce from continuing to engage in the conduct of appellant's aforesaid established, profitable and exclusively interstate business of transporting exports of alcoholic liquors from Kentucky to sister states, is a valid and reasonable regulation within the proper exercise of the police power of the Commonwealth of Kentucky and of its General Assembly;

(l) That said Control Law, in providing that common carriers of property by motor vehicles for hire shall be eligible to transact such business of transporting exports of alcoholic liquors from Kentucky in interstate commerce, and in declaring contract carriers of property by motor vehicles for hire, including appellant, to be ineligible to engage in said business and in said operations of interstate commerce, and, further, in providing penalties for violations of its mentioned provisions so extreme and severe as to preclude resort to the Courts in ordinary course to test the validity of said attempted regulations, does not deny appellant the equal protection of the laws, and does not contravene the Equal Protection Clause of the 14th Amendment to the Constitution of the United States; and

[fol. 169] (m) That in determining the question of the validity and constitutionality of said Control Law it is incompetent for the Court to take cognizance of said General Assembly's attempt and design to give common carriers of property by motor vehicles for hire a competitive advantage over contract carriers of property by motor vehicle for hire, by permitting the former class of motor carriers to engage, and by prohibiting the latter class of motor carriers from engaging, in the aforementioned business of carrying

and transporting from Kentucky exports of said alcoholic liquors in interstate commerce.

(B) Parts of Record to be Printed by Clerk:

1. Bill of complaint, filed July 18, 1938.
2. Amended Bill of Complaint, filed July 18, 1938.
3. Subpoena for Defendants, issued, July 18, 1938, on aforesaid Bill as amended, and Marshal's returns thereon.
4. Two notices of Hearing on Motion for Restraining Order, filed July 19, 1938, and Marshal's returns thereon.
5. Plaintiff's motion for temporary restraining order, filed July 19, 1938.
6. Temporary Restraining Order, granted July 19, 1938.
7. Order, convening Statutory Three-Judge Court, entered July 19, 1938.
8. Designation of Judge Robert R. Nevin.
9. Marshal's returns of service of certified copies of Restraining Order on Governor of Kentucky and defendants.
10. Plaintiff's Motion for preliminary injunction, filed July 26, 1938.
11. Defendants' motion to dismiss complaint and to dissolve temporary restraining order, filed July 26, 1938.
12. Order, extending Restraining Order, entered August 29, 1938.
- [fol. 170] 13. Second Amended Bill of Complaint, filed September 26, 1938.
14. Order, entered September 26, 1938, filing said Second Amended Bill of Complaint.
15. Receipt of defendants for copies of Second Amended Bill of Complaint, filed October 6, 1938.
16. Defendants' Consent to Filing of Second Amended Bill of Complaint, filed October 6, 1938.
17. Entry of Appearance of defendant, William E. Baxter, filed October 6, 1938.
18. Order, entered October 6, 1938, noting of record filing of defendants' receipt for Second Amended Complaint, consent of defendants that Second Amended Complaint be filed, and entry of appearance of William E. Baxter.
19. Joint Motion, that defendants' motion to dismiss complaint and to dissolve restraining order be extended to complaint as amended, including Second Amended Complaint, filed October 10, 1938.

20. Order, entered October 10, 1938, noting of record filing of joint motion that defendants' motion to dismiss complaint and to dissolve temporary restraining order be extended to complaint as amended, including Second Amended Complaint.

21. Opinion, dated and filed, October 15, 1938.

22. Plaintiff's Third Amended Complaint, filed November 22, 1938.

23. Defendants' Acknowledgment of Receipt of Copies of Third Amended Complaint and Consent that said Amendment be filed, filed November 22, 1938.

24. Joint Motion, that defendants' motion to dismiss complaint as amended and to dissolve temporary restraining order, be extended to complaint as amended, including [fol. 171] Third Amendment thereto, filed November 22, 1938.

25. Waiver of Notice, of Governor of Kentucky and of Defendants, filed November 22, 1938.

26. Judgment, entered November 22, 1938.

27. Petition for Appeals.

28. Assignment of Errors.

29. Jurisdictional Statement.

30. Appeal Bond.

31. Order Allowing Appeals, entered January 25, 1939.

32. Citation on Appeal.

33. Defendants' and Appellees' Acknowledgment of Service of Copies of Appeal Papers and of Service of Statement required by paragraph 3 of Rule 12 of Rules of Supreme Court.

34. Defendants' and Appellees' Acknowledgment of Service of Citation.

35. Order, entered January 25, 1939, filing defendants' and appellees' acknowledgments of service.

36. This Statement of Points to be relied upon, Designation of Parts of the Record to be printed by the Clerk, and Proof of Service thereof.

Ziffrin, Incorporated, Appellant, by Norton L. Goldsmith, Attorney for Appellant, 615 Kentucky Home Life Building, Louisville, Kentucky.

Proof of Service

The appellees named in the record in the above entitled cause and appeal, by counsel, hereby acknowledge that they, this 17th day of February, 1939, have received a copy, and

[fol. 172] have accepted service, of the within and foregoing Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed by Clerk.

Hubert Meredith, Appellee, Attorney General of Commonwealth of Kentucky; Harry D. France, Appellee, Assistant Attorney General of Commonwealth of Kentucky; William Hays, Assistant Attorney General of Commonwealth of Kentucky; H. Appleton Federa, of Counsel, Attorneys for Appellees, All of Frankfort, Kentucky.

[fol. 173] [File endorsement omitted.]

Endorsed on cover: Enter Norton L. Goldsmith. File No. 43,180. E. Kentucky, D. C. U. S. Term No. 695. Ziffrin, Incorporated, appellant, vs. James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky, et al. Filed February 20, 1939. Term No. 695, O. T., 1938.

(1302)

MICRO CARD

TRADE

MARK

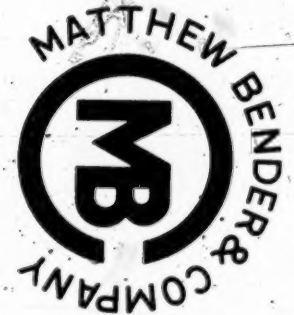


22

39

2

1021



65

